(26,124)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 657.

PETER CHELENTIS, PETITIONER,

vs.

LUCKENBACH STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals for the Second Circuit.

PETER CHELENTIS, Plaintiff-in-Error,

against

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant-in-Error.

TRANSCRIPT OF RECORD.

Writ of Error from the District Court of the United States for the Southern District of New York.

Office Supreme Court, U. S. Filed Aug. 31, 1917. James D. Maher, Clerk.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Peter Chelentis, Plaintiff, against Luckenbach Steamship Company, Inc., Defendant, a manifest error hath happened, to the great damage of the said Peter Chelentis, as is said and appears by its complaint, We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 13th day of January, 1917, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

2 Witness, the Honorable Edward D. White, Chief Justice of the United States, this 15 day of December, in the year of our

Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and forty-first.

[L. S.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

J. M. MAYER,
U. S. District Judge.

3 *Summons.*

Supreme Court, New York County.

PETER CHELSUTIS, Plaintiff,

against

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY, INC., Defendants.

Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, N. Y., April 19th, 1916.

SILAS B. AXTELL,
Plaintiff's Attorney.

Office and Post Office Address, No. 1 Broadway, New York City.

4 *Complaint.*

Supreme Court, New York County.

PETER CHELSUTIS, Plaintiff,

against

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY, INC., Defendants.

The plaintiff, by his attorney, Silas B. Axtell, complaining of the defendants, respectfully shows to this court and alleges:

First. Upon information and belief, that at all the times hereinafter mentioned, the defendant Luckenbach Company, Inc., was and

now is a corporation, organized and existing under and by virtue of the laws of the state of Delaware, and was and is doing business in the state of New York, with an office and principal place of business in the Borough of Manhattan, City, County and State of New York.

Second. Upon information and belief, that at all the times hereinafter mentioned, the defendant Luckenbach Steamship Company, Inc., was and now is a corporation, organized and existing under and by virtue of the laws of the state of Delaware, and was and is doing business in the state of New York, with an office and principal place of business in the Borough of Manhattan, City, County and State of New York.

5 Third. Upon information and belief, that on or about the 26th day of December, 1915, and at the times hereinafter mentioned, the above-named defendants owned or leased and operated and controlled a certain steamship known as the J. L. Luckenbach.

Fourth. That on or about the 26th day of December, 1915, and at the times hereinafter mentioned, the plaintiff was in the employ of the above-named defendants on board said vessel.

Fifth. Upon information and belief that it was the duty of the defendants to provide plaintiff with a safe place to work; with reasonably safe tools and appliances and keep same in repair; to furnish plaintiff with a suitable number of competent co-employees and superior officers; to promulgate and enforce proper rules for the safe conduct of the work and to warn plaintiff of the dangers arising and to be encountered therein.

Sixth. That by reason of the negligent and unlawful failure of the defendants and persons in their service having command to perform the foregoing duties and each of them, and because said defendants and said persons in their service having command, negligently failed to provide plaintiff with reasonably safe tools and appliances or with life lines, barriers, guards, enclosures or other devices, and because said defendants and said persons in their service having command, negligently and unlawfully compelled plaintiff to carry an ash bag across an open and exposed deck on board said vessel during a severe storm and while the waves were calculated to and did break over the same, plaintiff, although himself in the exercise of due care, was suddenly and without warning struck by
6 a wave with great violence and precipitated from his feet, thereby sustaining severe, painful and permanent personal injuries, as hereinafter more particularly set forth.

Seventh. That plaintiff thereby became sick, sore, lamed and disabled; has been and will be confined to his home for a long time; has been and will be prevented from attending to his work; has lost and will lose large sums of money which he would otherwise have earned; has suffered and will suffer great pain, and will, as he is informed and believes, have to pay out large sums of money for medical and surgical attendance and appliances; that at the time of said occurrence, plaintiff's leg was so badly and severely crushed, broken and otherwise injured that the same necessarily had to be amputated, so that plaintiff has forever been deprived of the power

of locomotion and will be compelled to walk on crutches or other appliances during the remainder of his existence. That plaintiff was a fireman by trade and is incapable of earning a living except by manual labor. That owing to said loss of his leg, he will never be able to perform his duties as a fireman or any work except of the lightest sort, and that for said reason, even if he is ever able to work again, his earnings will be greatly diminished compared to what he formerly earned; by reason of all the foregoing plaintiff has been permanently injured and damaged in the sum of $50,000.00.

Eighth. That said injuries were not caused by any fault or want of care on the part of the plaintiff, but wholly and solely by reason of the negligence of the defendants and persons in their service having command in causing plaintiff to do said work under danger-
7 ous conditions and failing to guard against same or to take any precautions for plaintiff's safety.

Wherefore, plaintiff demands judgment against the defendants for the sum of Fifty thousand ($50,000.00) Dollars, besides the costs and disbursements of this action.

SILAS B. AXTELL,
Attorney for Plaintiff.

O. & P. O. Address, 1 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
City and County of New York, ss:

Peter Chelsutis, being duly sworn, deposes and says that he is the plaintiff in the within action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

his
PETER x CHELSUTIS.
mark.

Sworn to before me this 25 day of May, 1916.

[SEAL.] MAURICE K. WISE,
Notary Public, New York Co., No. 252.

Register's No. 8189. Certif. filed Kings Co., No. 61. Register's No. 8981. Commission expires March 30, 1918.

8 *Notice of Removal.*

United States District Court, Southern District of New York.

L. 15—294.

PETER CHELSUTIS, Plaintiff,

vs.

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY, INC., Defendants.

SIR: Please take notice, that on the 8th day of June, 1916, the above-entitled cause was duly transferred from the Supreme Court, New York County, State of New York, to the District Court of the United States, in and for the Southern District of New York, and that on that day the record in said cause was duly filed in the said United States District Court.

Dated, June 12th, 1916.

Yours, etc.,

CARTER & CARTER,
Attorneys for Defendants.

To: Silas B. Axtell, Esq., Attorney for Plaintiff.

9 *Order for Removal.*

At a Special Term, Part II, of the Supreme Court of the State of New York, Held in and for the County of New York, at the County Court-house, in the County of New York, on the 7th Day of June, 1916.

Present: Honorable Thomas F. Donnelly, Justice.

PETER CHELSUTIS, Plaintiff,

against

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY, INC., Defendants.

On the sub-joined consent, and on motion of Carter & Carter, Attorneys for the Defendants, for the transferring of this cause to the United States District Court for the Southern District of New York, in due form of law, and it appearing to this Court that the plaintiff is a resident of the State of New York and each defendant is a foreign corporation, organized and existing under the laws of the State of Delaware, that this is a proper cause for removal to the said District Court, and that the Defendants have filed their bond, duly conditioned, with good and sufficient surety, as provided by law, it is

Ordered, that the said Bond be and the same hereby is accepted.

And it is further

Ordered and adjudged, that this cause be and it hereby is removed to the United States District Court for the Southern District of New York, and the Clerk is hereby directed to make up the record in said cause for transmission to the said Court forthwith.

Enter,

T. F. D., *Justice.*

We hereby consent to the form and entry of the foregoing Order. Dated, June 2nd, 1916.

SILAS B. AXTELL,
Attorney for Plaintiff.
CARTER & CARTER,
Attorneys for Defendants.

Answer of Luckenbach Company, Inc.

United States District Court, Southern District of New York.

PETER CHELSUTIS, Plaintiff,

against

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY, INC., Defendants.

The defendant Luckenbach Company, Inc., above named, by Carter & Carter, its attorneys, separately answering the complaint of the plaintiff herein, respectfully shows to this Court, and alleges:

First. Upon information and belief, under an Order, dated the 7th day of June, 1916, and signed by the Honorable Thomas F. Donnelly, one of the Justices of the Supreme Court of the State of New York for the County of New York, this case was removed from the Supreme Court of the State of New York for the County of New York, to the United States District Court for the Southern District of New York.

Second. It denies the allegation of the First Article of the Complaint which alleges:

"and was and is doing business in the state of New York, with an office and principal place of business in the Borough of Manhattan, City, County and State of New York,"

but admits the remaining allegations of said article.

Third. Upon information and belief, it admits the allegations of the Second Article of the Complaint.

Fourth. It denies the allegations of the Third Article of the Complaint, except in so far as the same are admitted in the Defendant's First Defense hereinafter set forth.

Fifth. It denies the allegations of the Fourth, Fifth, Sixth, Seventh, and Eighth Articles of the Complaint.

Further answering, and as a first and separate defense, the de-

fendant Luckenbach Company, Inc., upon information and belief, alleges:

Sixth. That prior to and at the times mentioned in the Complaint, to wit, the 26th day of December, 1915, the Steamship J. L. Luckenbach was leased and demised to the Luckenbach Steamship Company, Inc., by the Luckenbach Company, Inc., as owner thereof, and in accordance with the terms and conditions of the Lease the Luckenbach Steamship Company, Inc., had full operation and control of said vessel and was in full possession thereof as owner pro hac vice.

Further answering, and as a second and separate defense, the defendant Luckenbach Company, Inc., upon information and belief, alleges:

Seventh. That the alleged accident at the time and place referred to in the Complaint and any injury alleged to have been sustained by the plaintiff as a result thereof, were due to the negligence or fault of the said plaintiff or of some third person or persons causing or contributing to the same, and for whose acts the de-
13 fendant is not liable or responsible, and were not caused by any negligence or fault on the part of the said defendant or on the part of any one for whose acts defendant is liable or responsible, or on account of any unseaworthiness of the said steamship; and if the defendant as owner of the said steamship is liable for the alleged injury the plaintiff sustained through the neglect of his fellow-servants or some third person or persons or through his own neglect, then, in accordance with the General Maritime Law as administered in the United States, the said defendant is only liable for the wages due the plaintiff to the end of the voyage and his maintenance and the expense of cure.

Further answering, and as a third and separate defense, the defendant Luckenbach Company, Inc., upon information and belief, alleges:

Eighth. That any injuries sustained by the plaintiff were sustained in the ordinary course of his employment and occupation; that such alleged injuries were the result of the necessary risks of his occupation and employment and which were inherent in the nature of the business in which he was employed and which were assumed by him at the time he entered it and at the time he met with the accident complained of; that the said plaintiff on the 26th day of December, 1915, and prior thereto, had full knowledge of the said risks, and that by continuing his employment with full knowledge of the existence of such necessary risks and dangers, the plaintiff assumed the risk thereof and the injuries resulting therefrom.

14 Further answering, and as a fourth and separate defense, the defendant Luckenbach Company, Inc., upon information and belief, alleges:

Ninth. That the plaintiff knew of the alleged defect or negligence which he alleges caused the injury, and he failed within a reasonable time to give or cause to be given information thereof to the defendant, or to some person superior to himself in the service of his

employer or who had intrusted to him some superintendence, and that such defect or negligence was not known to such employer or superior person, prior to the alleged injuries to the plaintiff, and that such defect could not have been discovered by such employer by reasonable and proper care, tests or inspection.

Wherefore, the Defendant Luckenbach Company, Inc., demands judgment that the Complaint herein be dismissed with costs and disbursements.

CARTER & CARTER,
Attorneys for Defendant Luckenbach Company, Inc.,
15 Whitehall Street, Manhattan, New York City.

COUNTY AND STATE OF NEW YORK,
Southern District of New York, ss:

Henry P. Hamilton, being duly sworn, deposes and says: that he is the Secretary and an officer of the Luckenbach Company, Inc., one of the corporations named in the foregoing action; that the foregoing Answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information
15 and belief, and as to those matters he believes it to be true; that the reason this verification is not made by the defendant, is because the defendant is a corporation; that the grounds for deponent's belief as to all matters stated in said Answer, not stated upon his knowledge, are investigations which deponent has caused to be made concerning the subject-matter of this action, and information acquired by deponent in the course of his duties as an officer of the said corporation.

HENRY P. HAMILTON.

Sworn to before me this 17th day of July, 1916.

[NOTARIAL SEAL.] R. H. WHITTEMORE,
Notary Public, New York Co.

Certificate filed in Kings Co.

16 *Answer of Luckenbach Steamship Company, Inc.*

United States District Court, Southern District of New York.

35319.

PETER CHELENTIS, Plaintiff,

against

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY, INC., Defendants.

The defendant Luckenbach Steamship Company, Inc., above named, by Carter & Carter, its attorneys, separately answering the complaint of the plaintiff herein, respectfully shows to this Court, and alleges:

First. Upon information and belief, under an Order dated the 7th day of June, 1916, and signed by the Honorable Thomas F. Donnelly, one of the Justices of the Supreme Court of the State of New York for the County of New York, this case was removed from the Supreme Court of the State of New York for the County of New York, to the United States District Court for the Southern District of New York.

Second. Upon information and belief, it denies the allegation of the First Article of the Complaint, which alleges:

"and was and is doing business in the state of New York, with an office and principal place of business in the Borough of Manhattan, City, County and State of New York,"

but admits the remaining allegations of said Article.

17 Third. It admits the allegations of the Second Article of the Complaint.

Fourth. It denies the allegations of the Third Article of the Complaint, except in so far as the same are admitted in the Defendant's First Defense hereinafter set forth.

Fifth. It denies the allegations of the Fourth, Fifth, Sixth, Seventh, and Eighth Articles of the Complaint.

Further answering, and as a first and separate defense, the defendant Luckenbach Steamship Company, Inc., upon information and belief, alleges:

Sixth. That prior to and at the times mentioned in the Complaint, to wit, the 26th day of December, 1915, the Steamship J. L. Luckenbach was leased and demised to the Luckenbach Steamship Company, Inc., by the Luckenbach Company, Inc., as owner thereof, and in accordance with the terms and conditions of the Lease the Luckenbach Steamship Company, Inc., had full operation and control of the said vessel and was in full possession thereof as owner pro hac vice.

Further answering, and as a second and separate defense, the defendant Luckenbach Steamship Company, Inc., upon information and belief, alleges:

Seventh. That the alleged accident at the time and place referred to in the Complaint and any injury alleged to have been sustained by the plaintiff as a result thereof, were due to the negligence

18 or fault of the said plaintiff or of some third person or persons causing or contributing to the same, and for whose acts the defendant is not liable or responsible, and were not caused by any negligence or fault on the part of the said defendant or on the part of any one for whose acts defendant is liable or responsible, or on account of any unseaworthiness of the said steamship; and if the defendant as lessee of the said steamship is liable for the alleged injury the plaintiff sustained through the neglect of his fellow-servants, or some third person or persons or through his own neglect, then, in accordance with the General Maritime Law as administered in the United States, the said defendant is only liable for the wages due the plaintiff to the end of the voyage and his maintenance and the expense of cure.

Further answering, and as a third and separate defense, the defendant Luckenbach Steamship Company, Inc., upon information and belief, alleges:

Eighth. That any injuries sustained by the plaintiff were sustained in the ordinary course of his employment and occupation; that such alleged injuries were the result of the necessary risks of his occupation and employment and which were inherent in the nature of the business in which he was employed and which were assumed by him at the time he entered it and at the time he met with the accident complained of; that the said plaintiff on the 26th day of December, 1915, and prior thereto, had full knowledge of the said risks, and that by continuing his employment with full knowledge of the existence of such necessary risks and dangers, the plaintiff assumed the risk thereof and the injuries resulting therefrom.

19 Further answering, and as a fourth and separate defense, the defendant Luckenbach Steamship Company, Inc., upon information and belief, alleges:

Ninth. That the plaintiff knew of the alleged defect or negligence which he alleges caused the injury, and he failed within a reasonable time to give or cause to be given information thereof to the defendant, or to some person superior to himself in the service of his employer or who had intrusted to him some superintendence, and that such defect or negligence was not known to such employer or superior person, prior to the alleged injuries to the plaintiff, and that such defect could not have been discovered by such employer by reasonable and proper care, tests or inspection.

Wherefore, the Defendant Luckenbach Steamship Company, Inc., demands judgment that the complaint herein be dismissed with costs and disbursements.

CARTER & CARTER,
Attorneys for Defendant Luckenbach Steamship Company, Inc., 15 Whitehall Street, Manhattan, New York City.

COUNTY AND STATE OF NEW YORK,
Southern District of New York, ss:

Henry P. Hamilton, being duly sworn, deposes and says: that he is the Secretary and an officer of the Luckenbach Steamship Company, Inc., one of the corporations named in the foregoing action; that the foregoing Answer is true to the knowledge of this
20 deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason this verification is not made by the defendant is because the defendant is a corporation; that the grounds for deponent's belief as to all matters stated in said Answer, not stated upon his knowledge, are investigations which deponent has caused to be made concerning the subject-matter of this action, and

information acquired by deponent in the course of his duties as an officer of the said corporation.

HENRY P. HAMILTON.

Sworn to before me this 17th day of July, 1916.
[NOTARIAL SEAL.] R. H. WHITTEMORE,
Notary Public, New York Co.

Certificate filed in Kings Co.

21 *Extract from Minutes.*

At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the United States Court-rooms in the U. S. Court-house and Post Office Building in the Borough of Manhattan, City of New York, on the 11th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: Honorable Martin T. Manton, District Judge.

L. 15—294.

PETER CHELSUTIS

vs.

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY.

Now comes the plaintiff, by Silas B. Axtell, his attorney, and Fredk. R. Graves, of counsel, and move the trial of this cause. Likewise come the defendants, by Carter & Carter, their attorneys, and Peter S. Carter, of counsel. Thereupon a jury is duly empaneled and sworn and the cause proceeds to trial. Thereafter on Thursday Oct. 12, 1916, Mr. Graves moves to withdraw the complaint against Luckenbach Company, Inc. Consented to. So ordered.

Mr. Graves moves to amend the complaint as to plaintiff's name to Peter Chelentis. So ordered.

22 At the close of the testimony on both sides, defendant's attorney moves to dismiss the complaint and for a direction of a verdict. Plaintiff's attorney moves to go to the jury. Denied, exception.

By direction of the Court, Verdict for the defendant.

Plff.'s atty. excepts.

Plff.'s atty. moves to set aside the verdict.

Denied. Exc.

An extract from the minutes.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

A True Copy.
ALEX. GILCHRIST, JR., *Clerk.*

23 *Judgment.*

United States District Court, Southern District of New York.

35319.

PETER CHELENTIS, Plaintiff,

vs.

LUCKENBACH COMPANY, INC., and LUCKENBACH STEAMSHIP COMPANY, INC., Defendants.

The issues in this action having been brought on for trial before the Honorable Martin T. Manton, one of the Judges of this Court, and a jury, at a Stated Term of this Court, held on the 11th and 12th days of October, 1916, in the Post Office Building, Borough of Manhattan, City of New York, and the Jury having duly rendered a verdict, by direction of the Court, in favor of the Defendant, Luckenbach Steamship Company, Inc. (the action against Luckenbach Company, Inc., having been withdrawn by the plaintiff at the commencement of the trial), and the costs of the said Defendant having been taxed at $78#,

Now, on motion of Carter & Carter, Attorneys for the Defendant, Luckenbach Steamship Company, Inc., it is

Adjudged that the Defendant Luckenbach Steamship Company, Inc., have judgment against the Plaintiff, Peter Chelentis, upon the issues in the action, and recover of the Plaintiff the sum of $78.00 its costs as taxed, and have execution therefor.

Dated, October 19th, 1916.

ALEX. GILCHRIST, Jr., *Clerk.*

24 *Bill of Exceptions.*

United States District Court, Southern District of New York.

PETER CHELENTIS, Plaintiff,

vs.

LUCKENBACH STEAMSHIP CO., INC., Defendant.

Before Hon. Martin T. Manton, J., and a Jury.

New York, October 11th, 1916.

Appearances:

Silas B. Axtell, Attorney for the Plaintiff; Frederick R. Graves, of Counsel.

Carter & Carter, Attorneys for the Defendant;
Peter S. Carter, of Counsel.

A jury was impaneled and sworn.

Adjourned to Thursday, October 12th, 1916, at 10:30 o'clock A. M.

New York, October 12th, 1916.

Mr. Graves opened the case to the jury on behalf of the plaintiff.
Mr. Carter opened the case to the jury on behalf of the defendant.

25 PETER CHELENTIS, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

The Court: Do you speak English?
The Witness: A little.
Mr. Carter: I am informed that he speaks good English to the members and officers of the vessel. Let us try first and see. I don't like an interpreter if we can get along without it.
Mr. Graves: I am going to withdraw as to the defendant Luckenbach & Co., Inc., on the understanding that Mr. Carter admits that the Luckenbach Steamship Company, Inc., was at the time of this accident, and for some time prior thereto, had been the owner pro hac vice of the vessel on which this accident occurred.
Mr. Carter: The defendant Luckenbach Steamship Company, Inc., operated and controlled the vessel, and was the employer of all the engineers and seamen on board, including the plaintiff.
Mr. Graves: That is all admitted in the answer of the Luckenbach Steamship Company, Inc.
The Court: That is conceded on the record. There is no necessity of going into the proof on that subject.
Mr. Carter: No, sir.
Mr. Graves: You admit that this vessel was registered under the American Registry Law, and flew the American flag?
Mr. Carter: Surely.
26 The Court: Anything else to be stipulated?
Mr. Graves: That is all.

Direct examination.

By Mr. Graves:

Q. What is your name?
A. Peter Chelentis.

Mr. Graves: I move to amend the spelling of the plaintiff's name, as given in the complaint. The correct spelling is C-h-e-l-e-n-t-i-s.
The Court: Very well.

I am thirty-one years of age. My business is fireman. I live at 51 Warren Street. I have been a fireman in the United States about three years. I have been a fireman altogether ten or eleven years, I don't know, several years. I know a vessel by the name of J. L. Luckenbach. It is a steamship. I was fireman on board that vessel.

Mr. Carter: Don't waste time on that. I will concede he was a fireman on there. Ask the facts.

Q. When did you join the J. L. Luckenbach?
A. I can't understand, gentlemen.

Q. When did you ship on the Luckenbach, do you understand?
A. I don't understand.

By the Court:

Q. You were hurt on the 26th of December, 1915?
A. I hurt. I was hurt on the 26th day of December, 1915. I hurt me here (indicating) in the leg, broke my leg. I was going to throw ashes overboard. I been, before—I gone up—12 o'clock to 4 o'clock, and I gone up to the deck, and there was so much wind and water, a big sea, and I stopped for about half an hour after 4
27 o'clock, and half-past 4 I gone down in the engine room, and tell Mr. Kayser, the first assistant, to give me another man, and I—Mr. Kayser he said to me, "I can't give you another man; you go ahead, you God damn son of a bitch and throw the ashes overboard." After I came upstairs the waves pushed me. After fifteen seconds—I no seen Kayser at all—I came and took one bucket of ashes and threw in——

Mr. Carter: I think we better have an interpreter.
The Court: Have you got one?
Mr. Graves: Yes, I have one in court, a very good one.

ZACHARIAS GAVALYAS, sworn as interpreter.

(The witness then continued to testify, through the interpreter, as follows:)

By Mr. Graves:

On this morning of December 26th, 1915, my watch was from 12 o'clock to 4. The engineer in charge of my watch was Mr. Snell, the second assistant engineer. At 4 o'clock when my watch was over Mr. Kayser, the first assistant engineer, took charge of the work. That gentleman is in the court room here; that is him (indicating Mr. Kayser).

Q. In the course of your duties, at the end of your watch, what were you accustomed to do with reference to ashes, if anything?
A. After half an hour after 4 o'clock, I had to throw the ashes overboard, the firemen cleaned the fires, and sent the ashes up for us to throw them overboard. This was done on every ship. I did
28 it on this ship. When Mr. Kayser, the first assistant, took charge of the engine room, the fire room, at 4 o'clock, December 26th, I went down to see the first assistant engineer to give me another man to throw the ashes overboard on account the weather was bad. My partner went with me. His name was Thomas Nicholas. He is the same man who testified before a notary public, Mr. Carter and yourself in your office several months ago. At the time I just mentioned I went down the stairs on the starboard side engine room stairs. Just before that I had been on deck. I seen the condition of the weather. The wind was blowing on the port side, the sea was pretty heavy on the port side. There were heavy waves. The

waves was coming on to the deck. When Thomas Nicholas and I went down the stairs we saw Mr. Kayser, the first assistant engineer, on the platform below, away below, in the engine room. This platform was located, with regard to the stairway, on this side of the ship (indicating). The engine was in the center and the stairs was on the side. On this occasion I said to the first assistant engineer to give me one other man to throw the ashes on the starboard side instead of the port side. He told me to go ahead and throw the ashes, "the same as you used to do all the time. I will not give you another man," and called me a "son of a bitch." I usually used to throw the ashes at other times always on the port side. There was not a hoisting ventilator on the starboard as well as on the port side of the house over the fire room. There was only one—on the port side. After this conversation Nicholas and the first assistant engineer and I came right up together, the three of us, and the first assistant engineer, as soon as he went up, he pushed me out, and Nicholas went right into the place where they hoist the ashes through. When I say he pushed
29 me out I mean on the starboard side of the deck. Then Nicholas went into the winch, the steam-winch house, and so I got hold of a bag to throw it overboard. I dumped it from the port side. I took it from the port, the fire room port, there is a chute there run by electricity, and I got hold of it, got it out of that and took it over about fifteen feet away. I walked across the deck on the port side with one bag of ashes. The distance that I carried that bag was approximately fifteen or eighteen feet, I did not measure it. On the way coming back to get another bag, about four feet, before I got to the port, a wave came in, the water, and took me right down, capsized me. It was a big wave. The both ports closed up. The water was up to here (indicating waist). After the water threw me down it took me between the cross bunker and the fire room, in a small place. There is a kind of pipes there, and it put me in under the pipes. That place is in the back of the fire room. After that I was carried by the water from the port side to the starboard. I broke my leg under the pipes, and then the water dumped over the side, and I held myself to the ship's side, half outside and half on the inside. A couple of minutes after my partner pushed the port out, and the water went out, and he got me by the neck, and pulled me right in and took me right down. I understand my leg was broke, but I did not feel any pain right away. After my partner pulled me out by the neck from the rail I was taken to the cook's room. Afterwards the captain and the chief engineer and Mr. Kayser and Mr. Snell they went down into the room where I was laying. The chief engineer put a little needle into my arm and stopped my pains. After they make my leg fast they took me over to the
30 first assistant engineer's room. They made the right leg fast, because it was bleeding and hurt, and they make me—wrap me up. Wrapped me up in splints. That was the right leg. About half an hour before, it hurt when I felt so many pain, but after the chief engineer put in the needle, it stopped a little bit the pains. The J. L. Luckenbach got into New York the 27th of December in the morning—the day after I was hurt. After the ship entered the har-

bor the government ship went alongside and they took me over to the Marine Hospital. I remained in the Marine Hospital three months and four days. Three days after I got there they operated below the knee to pull the bones together. About a month and a half or so afterwards, I don't exactly remember how long it was, they cut my leg off above the knee, top of the knee. During the three months and four or five days that I was in the hospital night and day I had pains. When I came out of the hospital I went down to 51 Warren Street. I have been there ever since. I have not done any work of any sort since this accident. At the time I was injured I was earning $35 a month. I know what they are paying firemen to-day. Some companies pay $50, some pay $55, some up to even $60, and so on.

Juror No. 7: Is that with the board included?

Mr. Graves: He gets his board and lodging besides that. I am glad you asked that question.

A. (Continuing:) When I was fireman on the boat I got my board and lodging in addition to my wages, expenses from the company. Going back to the time that I stated, about 4.30 in the morning, when Mr. Kayser gave me these orders, the second assistant
31 engineer had gone to sleep and all the other engineers were sleeping. Mr. Snell was not on watch, he was on watch before Kayser came on. The chief engineer was in his room—in his own private room, and the fourth engineer was sick.

Q. At the time he gave you the orders, at the time Mr. Kayser gave you these orders to dump the ashes over the port side, was he in charge of the fire room and the engine room?

A. He had the four to eight watch, and he got charge of everything. And this happened at 4.30.

Q. During the rest of the trip, before you were injured, when the chief engineer and when the other assistant engineers were not in the engine room and fire room, but were in their rooms, and when Mr. Kayser, the first assistant, was on duty, and in those places, from whom did you take orders?

A. When we left this port, before we left port, Mr. Kayser, the first assistant engineer, put everybody on five and nine hours.

Q. When, on other occasions, on this same boat, prior to the time you were hurt, when all the other engineers were not in the engine room and were not in the fire room, what on those occasions did you see Mr. Kayser say or do when he was in those places?

Mr. Carter: Now, I object to that as incompetent, wholly, because what has Mr. Kayser, the first assistant engineer, got to do with another occasion than this occasion, when this man is in the second engineer's watch? That cannot be binding in this case.

Mr. Graves: I think Mr. Carter will concede that whatever officer was on the watch, had full charge.

Mr. Carter: That is a different matter. I move to strike this out.

The Court: Yes.

32 Q. Whatever engineer had the watch, he had full charge and authority on that watch?

Mr. Carter: If that man was in his watch?
Mr. Graves: No, sir.
The Court: What do you say Kayser did at all times?
The Witness: He was looking after the engine room, the engines.

Q. Did you ever see him tell anybody in the engine room to do anything?

Mr. Carter: There is no doubt about it. He must have talked to them in the engine room.

A. I saw him many times.

The Court: Is there any dispute about Mr. Kayser?
Mr. Graves: No, sir, that is all conceded, that he was the first engineer and had charge of this watch.
The Court: It is conceded Mr. Kayser was the first assistant engineer?
Mr. Carter: Yes, and Mr. Snell was second, and Mr. Haigh chief.
The Court: And Mr. Kayser was on duty at the time of this accident, as first assistant engineer?
Mr. Carter: That is right, but not on this watch.
The Court: And this plaintiff was one of the men under his charge at that time?
Mr. Carter: No, sir, he was not.
Mr. Graves: He was in his department.
Mr. Carter: No, sir, not for that watch.
Mr. Graves: The testimony is he had to stop half an hour,
33 afterwards, and did this work in the following watch.
Mr. Carter: Yes, that is Mr. Snell's watch.
Mr. Graves: That is all.

Cross-examination.

By Mr. Carter:

This was the second voyage I made on the J. L. Luckenbach before I was hurt. On the voyages that I was on the ship on that one side of the ship I did not ever hoist the ashes up out of the fire room and discharge them overboard in weather such as we had on this day. We did have some bad weather when we were dumping ashes. On the morning that I was hurt, the way the wind was blowing, the right-hand side of the vessel was the right side to dump ashes overboard. I mean the starboard side. And also the lee side. I don't understand the lee side. The windward side is on the left side. That was where the wind was blowing when I was hurt. I understand that.

Mr. Carter: Now, gentlemen of the jury, for your information I will show you that. This is the ship (indicating) and this is the port side (indicating). This is the way the wind was (indicating). This is northwest, coming up (indicating). That would be the lee side, and the wind would blow that way here (indicating).
The Court: Blowing in toward shore?

Mr. Carter: No, sir, offshore would be the lee side, and onshore, coming up the coast would be the windward side—whichever way the wind blows to you, this would be the windward (indicating) and your back would be the leeward. That is what it means.

34 Q. When you were on a watch, as a fireman, you take orders only from the officer that is in your watch, is that not true?

A. From the second assistant engineer I was taking my orders below. I was in Mr. Snell's watch that morning up until 4 o'clock. Mr. Snell, the second assistant engineer, and everybody went off the watch at 4 o'clock in the morning. Before Mr. Snell went off watch he didn't tell me to go upstairs and start to take the ashes away, and dump them overboard, Mr. Snell didn't tell me anything. I started dumping ashes because I have to do it, after 4 o'clock, after four hours' duty I have to dump my ashes. I know it is my duty when I come off watch without Mr. Snell telling me, to dump the ashes, that is part of my duty without being told. Before I started to take up the ashes out of the hold and dump them I was looking with my own eyes. The weather was pretty bad. That was why I went down.

Q. When you knew the weather was pretty bad what did you want to start to hoist up the ashes and throw them overboard for?

A. We could not leave the ashes below in the fire room after we have a watch, that is why we went down in the engine room to get another man, because the weather was bad. That was why we went down in the engine room to ask for another man on account of the weather being bad.

Q. When Mr. Kayser would not give you another man to help dump the ashes, why did you do it?

A. I got scared. He was liable to put me in irons, and he called me names, a son of a bitch.

The Court: What else?

Q. Yes; what else?

A. And he pushed me out.

The Court: Was it then you went out and went upstairs to dump the ashes?

35 The Witness: Yes, just threw the first bag, and before I got the second one I got—the water came in and hurt me. I dumped the first bag on the port side. The port side door of the fire room was not locked. The water was coming away up from the gratings, and both doors were closed.

Q. When Mr. Kayser told you to go up and dump the ashes in the usual way, what did he mean? On what side of the ship?

A. No other way to dump the ashes, with two men, on the port side. You have to have three men on the starboard. You need three men to throw them overboard on the starboard side, because you have one man at the winch, and another man to take from the winch, and another man to throw it overboard. I cannot walk over from the port side of the fire room over to the starboard side after I hoist up the bag; I can't do it by myself, because there is a cross bunker between.

Q. When you went to dump the bag over the starboard side, didn't you kick out the gate, as they call it, to dump the ashes, with your foot?

A. I didn't hold anywheres, I just held the bag on top of the vessel and threw it down, and the wave coming back, the water, took me down. Where I lay on the deck when I was struck by the waves is about ten or fifteen feet from the pipes, I don't know exactly.

Q. If you fell on the deck, from the sea striking you, how could you then be with your feet near the pipes, if you were fourteen feet away?

A. Because the ship threw and the water arose me up and threw me under it, just arose me right over. The chief engineer was the first man of the officers that came to me when I lay on the deck.

36 The Court: There is no claim in this suit, is there, for maintenance, cure or wages?

Mr. Graves: That is not asked for.

Mr. Carter: No, sir, nothing at all.

The Court: You don't wish to ask for that?

Mr. Graves: Not in this action, no, sir.

After the chief engineer Mr. Kayser was the next person to come to my assisance; after that came the captain. Mr. Kayser and after him the captain. Mr. Snell was also there, the three engineers and the captain. At the time the officers came in I was in the cook's room. I did not say to the captain and Mr. Kayser and Mr. Snell when the captain asked me how I got hurt that when I was about to throw the ashes overboard out of the bag, I shoved out with my right foot the swinging wash gate, and that the vessel took a roll back again to port and jammed my leg. I was talking with the captain not to cut my leg, to fix me up not to lose my leg. I did not tell the captain how I got hurt, nobody asked me anything before I went to the hospital, when I was brought in the state room, when I got hurt.

Mr. Carter: That is all.

Mr. Graves: That is all.

The Court: I would like to ask a few questions.

By the Court:

I was downstairs when Mr. Kayser told me to go up and to put these ashes out. I was down in the engine room.

Q. Who was the mate of this ship—what was his name?

Mr. Carter: Elwald was his name. He is here.

37 A. I don't know that man. I don't know what you mean. He is over there, the chief mate. That was the chief mate. The captain is there.

Mr. Graves: The engineering and the navigating department are two different departments, and don't take orders from one depart-

ment to the other. That is conceded, Mr. Carter. That is on the record.

Mr. Carter: Yes.

Mr. Graves: That is all.

Another witness, GEORGE W. STONER, called as a witness, on behalf of the plaintiff, being duly sworn, testified as follows:

The Court: Do you want to prove his leg is off?

Mr. Graves: I asked Mr. Carter to concede it, and I thought I would have to prove it, to have the doctor here to show the necessity for it.

Mr. Carter: Oh, no.

The Court: Well, he would not take it off if it was not necessary. Step down.

(The witness, George W. Stoner, then left the witness stand.)

Mr. Carter: It was not a question of taking if off. It was only to show whether it was proper.

The Court: Do you concede his right leg is gone above the knee?

Mr. Carter: Yes.

The Court: And that it was necessary to amputate the leg to save the man's life, I suppose?

38 Mr. Carter: I suppose so. It is not important. I can't tell that myself.

The Court: They would not take it off if it was not necessary. Call the next witness.

Mr. Graves: I submit two depositions taken on consent.

The Court: Read them to the jury. (To the jury): The witnesses are away and the testimony was taken out of court, because we could not have them here, and it will be read with the same force and effect as though the witnesses were here, and you are to give it due consideration, that is to say, the same as if you heard it from the lips of the witnesses on the witness stand. Now, proceed.

Mr. Graves: I will read the deposition of Thomas Nicholas first.

(The direct examination of THOMAS NICHOLAS was then read to the jury by Mr. Graves and was as follows:)

By Mr. Graves:

My name is Thomas Nicholas. My nationality is Roumanian. I understand some Italian and Greek. I understand very little English. I am forty-two years old. My business is fireman. I live at 51 Warren Street, Brooklyn. I have been going to sea seventeen years. I have worked on a boat called the J. L. Luckenbach. I don't remember when I shipped, but I remember the day when we got back to New York. I know Peter Chelentis, he was on my watch and my mate on board. That is Peter Chelentis sitting over there, that man with his leg cut off at the knee. That was a steamship. I did the work of a fireman. Chelentis did fireman's work. I remember the time when the ship was coming back to New York,

the 26th of December. On that day I was raising up ashes
29 to the deck. Chelentis was taking a bag of ashes and taking them over to the other side to dump them overboard. It was Sunday morning about 4:30 A. M. The weather was very bad, very bad, couldn't open door. You couldn't open it because the water was three or four feet deep on the deck. Waves were coming over the deck. On this occasion I was working on the winch; hoisting ashes. Chelentis was taking bags from the door, and going across the deck. Me and him was up there, nobody else. The second engineer was by the gangway, near the winch. The second engineer and the first assistant engineer are the same. I had some conversation with the second engineer just prior to the commencement of this work; I and Chelentis in regard to dumping ashes. We went down into the engine room and told the first assistant engineer that it was too rough to dump ashes, and that we needed an extra man so as to dump them over the starboard side instead of the port side, as there were less waves on the starboard side. The first assistant engineer said in reply, "If you fellows are not able to dump ashes in this kind of weather, what are you shipped for; hurry up, go up and shoot ashes." We went up and as soon as I gave Chelentis the first bag he took it outside and the sea came over him and hit him, and threw him down with the bag. He was carried somewhere near the pipes. The first thing that attracted my attention to Chelentis being hurt was his hollering. The fire room door was closed on account of the pressure of the water; I pushed against it and looked out and could see nothing and looked on the other side and saw Chelentis against the rail, half overboard, with his arm over the rail. After I pulled Chelentis up, I looked around and saw another man standing by the pump.
40 This man's hand had been caught in a machine. There was something around his hand, it was bandaged up. After Chelentis hollered, the first assistant engineer came out of the engine room and then some of the others.

Q. Why couldn't you take the ashes and dump them over the starboard side?

A. You have to have three men to dump it on the starboard side. We said to the first assistant engineer we couldn't dump on the port side because the weather is too bad; we need another man so we will do it in easiest way. The first assistant engineer said, "Go ahead and dump in the same place where you always do; hurry up and dump it on the port side." He did not give us an extra man until after Chelentis was hurt, then he gave us an extra man and we dumped it on the starboard side. After that they slit Chelentis' pants and took of his shoes and took him into the cook room and laid him down between blankets on the floor.

(The cross-examinatoion of THOMAS NICHOLAS was then read to the jury by Mr. Carter and was as follows:)

By Mr. Carter:

When we first came on deck to raise the ashes from the hold to bring it on deck, Chelentis and I went to look and saw the weather

was so bad that we went down again. The second time we went up we didn't go of our own free will, but he made us go up. No wind on both sides; there is only wind on one side, that is port side; two men can raise it on the port side, but on the starboard side somebody has to stand outside and one inside to bring it to him.

Q. If that is so, why didn't you wait until you got a third man to throw it over starboard side and not put it over the port
41 side?

A. We went down to get another man, but were chased up. I did it, I didn't stop and not work, because I don't understand English well, and when he said, "Hurry up" I was scared and thought I had to do it. As soon as Chelentis got hold of the bag and standing outside of the door, that's all I saw, because water came and slammed the door. I saw him take the bag in his hands in front of the door and after I went out again I couldn't see him for a minute. As soon as I heard the noise, I pushed the door against the water and dumped out into the water and heard a noise on the other side and went to the starboard side and took hold of him and pulled him down. His foot was right in the hole in the side of the vessel, in the diagram which the letter A is. He was washed over by the water from the port side to the starboard side. I paid no attention how much of his leg was in this opening, but I pulled him right down. There is a door plate in that hole there where A is marked on this paper. There is a door plate on the port side, too. That door plate on the starboard side was for dumping ashes. On board of steamships they have a chute for dumping ashes, but the night before they took it away and made it fast some place so it wouldn't be washed away. They hadn't used the chute for five or six days. We didn't use it for five or six days, because it was too rough, water was coming in all the time, and we had too much trouble to keep it straight.

Q. Then you took the chance of dumping it by hand instead of the chute?

A. It would be just the same; had bags with handles on, and took hold of handles and turned it upside down. After he got his leg hurt, about ten minutes after I worked the same winch and shot
42 ashes on starboard side. We had three men after he got hurt.

This here marked B is the bow of the ship. C is the port side. A is the starboard side. D is the stern. This here, E, is part of the stokehole to go down in the hold. F is the winch where you hoisted ashes up.

(Defendant offered the diagram in evidence, and same was marked Defendant's Exhibit A.)

(The redirect examination of Thomas Nicholas was then read to the jury by Mr. Graves, and was as follows:)

By Mr. Graves:

I am sure that C or the port side of the vessel was the place where he was struck by the waves. Then he was carried over to the starboard side.

(The foregoing testimony was duly taken through an interpreter.)

Mr. Graves: I now read the deposition of Hassan Omer:

(The direct examination of Hassan Omer was then read to the jury by Mr. Graves, and was as follows:)

By Mr. Graves:

My name is Hassan Omer. I was twenty-three years old. My nationality is Turkish. I can talk very little English. I only speak a little English, perhaps one or two words. I do not understand a little English. My business is fireman. I have been a fireman six years. I live at 51 Warren Street. I know a steamship by the name of J. L. Luckenbach. I was employed on that boat. I was working on that vessel as a fireman. I cannot tell exactly when I joined that steamer. I know this man sitting over here with his leg off.
43 He is the plaintiff in this action. His name is Peter Chelentis.
I know Peter Chelentis, the man sitting in this room. Peter Chelentis was working on the J. L. Luckenbach, he was a fireman. Peter Chelentis I know was injured on the J. L. Luckenbach, I was right there when he was hurt. I don't remember exactly how many days before Chelentis was hurt that I joined the boat, about forty-three days. I joined the ship at the Port of Brooklyn. Chelentis was on board the boat before me. Chelentis was on the boat all the time that I was on board. I remember the occasion on which Chelentis was injured, but I do not remember the day of the month. On that day the steamer was bound for New York. At the time the boat was going towards New York and twenty-four hours after the accident the vessel arrived in New York. At the time Chelentis was injured I went to get a drink of water on deck. This was about 3 o'clock in the morning.

Q. Did you see Chelentis there?

A. I went to save him, but at the time my hand was cut, and I couldn't give him much help. At the time Chelentis was on the left side of the steamer. He was on deck; same place where he was throwing ashes over. These ashes are taken from the stokehole. He and his mate were working together; he was heaving and this man was taking it from the hook and throwing it overboard. The ashes go up in bags. These bags were four feet high and about three feet wide. There were two handles, one on each side of the bag. Some small machinery carried those bags up from the stokehole. The bags hooked on to a wire and then were hoisted up with the wire, hoisted up by machinery. On the occasion when Chelentis
44 was injured I was going to get a drink of water and I don't know what they had been doing, but I just saw Chelentis with the bag and then the sea. After those ashes are brought up by means of the hoist they throw them in the water. They are taken to the water by hand and thrown overboard. They are carried from here to about over there (indicating a distance of 15 feet). They are carried across an open deck. It was rather rough weather when the

second engineer forced him to throw the ashes overboard. Of course, we cannot go on deck if the weather is too rough. At the time when those men were taking ashes on board the first assistant engineer was forcing them and cursing them and was telling them "hurry up and finish your work." The weather was rough on the morning of the accident. There was a heavy sea running. The ship was pitching and rolling and the sea was going and coming. Water was coming up on the deck at the place near where I was standing, while I was watching, water came up to my knees. I saw the first assistant engineer on deck, he was on deck. I heard the first assistant engineer cursing and telling them to hurry up.

Mr. Graves: Will you concede, Mr. Carter, that the first assistant engineer had authority to give orders?

Mr. Carter: That is assumed and I will concede it if it was within his watch.

Q. What did the first assistant engineer say to Chelentis on the morning of the accident just before he was injured?

A. I heard him say, "Hurry up" to the firemen. He said that to Chelentis, Chelentis said, "All right." I then saw Chelentis at the time when he was carrying the bag and the water came over him. Then he was swept from his position clear to the other side. He was swept from left and thrown to right. He was knocked down like a dead man. The water came from over the side. I don't know whether the steamer was going up into the wind or away from the wind; I am not a navigator. There were mountain seas. After the water covered him he was knocked in the corner, and after that not so much water came. Waves had been coming on deck for some time before that. The first assistant engineer was instructing these men to throw ashes over the side. He said, "Hurry up." The men said, "All right." Two men were on deck doing that work. One man was heaving and the other was throwing them overboard. The man throwing the ashes overboard was Chelentis. The other man was inside. The only other person on deck besides me was Chelentis and his mate and the first assistant engineer. After Chelentis was knocked down and after the water had come on deck the first assistant rushed over to him to give him assistance. He was taken to the cabin. He appeared to be hurt. I was right there and I looked at the man; I was rushing to him; my hand was hurt, and if my hand wasn't hurt that much would not have happened to him, for I might have been able to give him assistance. I saw the man when he was thrown over there and I heard when he hollered "oh" at the time that he was hurt. We did not have any doctor on board, the captain did the doctoring, also chief engineer. I went to see Chelentis the next day. He was bandaged up and lying down. All his leg was in bandages and bloody. I am employed now by the same company on the ship called the Harry Luckenbach. I am still working for the same company. I am going away on that boat for them the next trip she takes. I have worked for that company ever since the accident.

46 (The cross-examination of Hasaan Omer was then read to the jury by Mr. Carter, and was as follows:)

By Mr. Carter:

I have been going to sea six years. On the morning that Chelentis got hurt I was a patient on the ship and I was not on watch. On the morning that Chelentis was hurt I wasn't working when I came on deck; I had no watch at that time, because my hand was cut. I know what the port side of the ship is. It was on the port side or left-hand side where I saw him with the bag. The place where the rail was was pretty heavy weather and when he put the bag on the rail at that time the sea overtook him.

Q. When you dump ashes overboard, don't you have a chute to put it through and it falls overboard?

A. In rough weather they do not have any tube there on account of the weather. I do not think it is right to throw ashes toward the wind when it is coming over the ship. There wasn't very much sea coming on the other side, only on the port side it was coming over. On the starboard side, right-hand side, it was least, there was some but not so much. It would be better to throw it over the starboard side.

Q. Is there not in the bulwarks a door that goes down in the deck to throw ashes instead of throwing ashes over the ship, if you want to?

A. Only the chute place there but the ashes wasn't there and through that place water was coming and there wasn't any door. On the starboard side there was not very much water coming in through the opening or door in the bulwarks. I stopped on the deck so early to see what Chelentis was doing because I was getting a drink
47 of water. I stopped because I was trying to protect myself from the heavy seas.

Q. You didn't know that Chelentis got hurt until you heard the first assistant engineer sing out for some one to come and help him, did you?

A. At the time when I was trying to protect myself and then I heard the first assistant say, "Hurry up." I think it was around 3 o'clock in the morning when I was on deck when Chelentis got hurt. It wasn't very light. I- was just like down.

(The redirect examination of Hasaan Omer was then read to the jury by Mr. Graves, and was as follows:)

By Mr. Graves:

There were not any rails or ropes going out from the door of the engine room to the side of the vessel.

(The foregoing testimony duly taken through an interpreter.)

ELDON H. READ, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

By Mr. Graves:

My full name is Eldon H. Read. I am a master mariner.
The Court: The captain of this ship?
The Witness: Yes.
The Court: At the time of the accident?
The Witness: Yes, sir, at the time of the accident.

As captain of the vessel the whole of the ship was under my
48 supervision or direction. I had on board a mate, or first officer. He is a navigating—a licensed officer. I had a second mate. I had a third mate. And then I had my seamen. Able seamen. We had a full complement. We also had a department which is termed the engineering department, the engine room department. Mr. Haigh, the chief engineer, was in charge of that. He had three assistants. They were Mr. Kayser, first assistant, Mr. Snell, second assistant, and I don't remember who was the third assistant on that voyage. On the night of this accident I was not up on the bridge at the time the accident occurred.

Mr. Carter: Well, that was in the morning.

In the morning, at the time of the accident, I was in bed asleep. The chief officer was on the bridge. The other two, the second and third mate, were also off duty. I presume they were in their bunks or in their rooms. The watch was changed at 4 o'clock. I don't know where the chief engineer was. The first assistant engineer was supposed to go on watch at 4 o'clock. I don't know whether he was on watch or not. I presume he was. In regard to the engine room department one engineer is on watch at a time. They spend four on and eight off. There is only one that has charge of the engine room and fire room at a time. I suppose that at 4.30 o'clock, or thereabouts, on the morning of this accident Mr. Kayser, the first assistant engineer, was in full charge of the engine room and fire room. It was his watch.

Q. And in connection with that, he was, of course, in full charge and authority over the firemen, the water tenders, and also the other employees of that department?

A. I couldn't say whether he was or not. He was in charge of the engine room where this man who was hurt was.

49 Q. Never mind, I didn't ask you for that.

The Court: Just answer the question.

A. I couldn't say whether he was or not.
Q. Under ordinary usage he would be, wouldn't he?
A. I don't know. That comes under the chief engineer.

Mr. Graves: That is all.

ALBERT P. KAYSER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

By the Court:

I was the first assistant engineer on this boat. I was on watch at the time of the accident. The chief engineer is never off duty. He is in charge of the whole department. He is supposed to be in charge of the department at all times so as in case of accident. I couldn't say whether he was asleep or on watch at this time. I saw him after the accident happened.

Q. Was there anybody above you in the engine room, in charge, in authority?

A. No, your Honor.

The Court: That is all you want.

Mr. Graves: Now, I rest, unless Mr. Carter wishes to cross-examine.

By Mr. Carter:

Mr. Chelentis is not above me. He was in Mr. Snell's watch. He was not in my watch. I had nothing to do with him, nor to give orders to him.

50 By the Court:

Q. You mean if you did gives orders to him it would be above your authority?

A. It would not be above my authority, but it is not the custom, because he was in his watch. The second assistant is supposed to do the same work, finish up his work like the firemen. In a case like this, I have to stay in the engine room to see the ashes are hoisted, and the work is done.

By Mr. Carter:

But any orders given by Mr. Snell, the second assistant engineer, to this Chelentis, to drop ashes, or do anything with them, I did not interfere with the orders.

By Mr. Graves:

Mr. Snell's watch came to a close at 4 o'clock on the morning when Chelentis was hurt. Mr. Snell went up out of the engine room after that. I do not — whether he went to his private room. He was off duty. I took his place. I took charge of the actual engine room, and all in there, and of all the firemen and oilers in the engine room. In other words, whatever engineer was on watch had complete authority over the men in that department, on watch.

By the Court:

Q. Wasn't this man on watch?

A. He was off watch.

By Mr. Graves:

Q. It has been testified that the custom was——

The Court: He was off watch?

The Witness: He was off watch.

51 Mr. Graves: That is the testimony, but there is evidence here that they would go off their watch for half an hour, to go on deck, and smoke and rest, and then go back and clean up the ashes.

Mr. Carter: That is all right, but that is his watch. That is not the next watch.

By Mr. Carter:

Q. When Mr. Snell, the second assistant, went off a watch, with Mr. Chelentis, who was in his watch, is he not then off the watch until he is ready to go on again?

A. He is off the watch.

Q. And when you go on a watch, you have your own men?

A. I have charge of the men below.

By Mr. Graves:

I have charge of the firemen. This place where these ashes go up is in the fire room.

By the Court:

Q. Who has charge of the removing of the ashes?

A. The man on watch.

Q. Were you the man on watch?

A. I was the man on watch.

By Mr. Carter:

Chelentis has to take the ashes from the man on the deck, but he was not in the engine room, he was on the deck. That is, the men below, they fill the bags, and they are sent up to dump. And he removes them for his own watch.

By Mr. Graves:

The place where they hoist them up to is on deck. Where they hoist the ashes from the fire room is on deck. They are hoisted from the fire room.

52 Q. Now, that is like grating where they carry it up to on deck?

A. They go through ventilators. There is a ladder with a chute and a lot of grating that you would stand on and you can go right down these ladders right into the fire room. And the house is over the hoist. It is shut off from the rest of the deck. That house is a cover to the fire room and the top grating; that top floor is level with the deck. And that is part of the fire room, and I had charge of the fire room.

Mr. Graves: I rest.

Mr. Carter: I move to dismiss the complaint on the ground that, as shown by the pleadings here, there is no charge shown against the defendant, and furthermore that under the law, in such a case where

a seaman is hurt on board a vessel, the liability of the owner of the vessel is for the man's maintenance, wages and cure.

The Court: You are moving to dismiss on the proof, not on the pleadings?

Mr. Carter: Yes, on the proof; that the testimony shows clearly that the man was injured by the seas coming over the vessel, knocking him down, which is purely and strictly an act of God, and we cannot control that.

The Court: You move to dismiss because there is no evidence connecting you?

Mr. Carter: That is correct.

The Court: What else?

Mr. Carter: The next ground is on the ground, that as the evidence shows clearly, there was negligence contributory on the part of this plaintiff. He knew what the condition of the weather was.

53 His witnesses also testified as to the weather conditions and he assumed that risk when he undertook to take the bags of that size, of ashes, and throw them over the starboard side, or to the port side, when he knew the weather conditions, and he assumed that risk, and that was part of the risk he assumed, just the same as a passenger on a vessel; and his story of calling for a third man to take them to the starboard side, shows that he knew the conditions of the weather existing at the time, and he assumed that, and that was one of the risks that sailors assume.

The Court: What do you say, Mr. Graves?

Mr. Graves: I say this, that even conceding that all this were quite true nevertheless because of the neglect and negligent order of the seaman having command and authority at the time, the man in direct charge over this plaintiff, the plaintiff was bound to obey him.

The Court: Where is your negligence?

Mr. Graves: The direct testimony is that the order was to dump it over the port side.

The Court: Suppose he was told to jump overboard, is he compelled to do that?

Mr. Graves: No, but this is an order given in the navigation of the ship.

The Court: Suppose he told him to go over and strike another man. Does he have to do that?

Mr. Graves: Well, my contention is that that is a question for the jury. Of course, you are putting an extreme case. As I understand it, they have to do practically everything they are told to do on board a ship.

The Court: That may be the practice, but the law must be observed.

54 Mr. Graves: Well, I think it is for the jury to determine.

The Court: Is there anything else you wish to say?

Mr. Graves: I say this, that under this amendment of the Seaman's Bill, the language says, as I recall it, that in every action brought in any court whatsoever for damages, the act of a person, as a seaman having command and authority, should not be deemed to be that of a fellow-servant. My point then is that this man was, under the

proof, directly in charge of this man who had command over this part of the work. The only charge that the captain would have would be perhaps to ring a bell, or signal down there to reverse the engine, or something of that sort, but this part of the work was in direct charge of other men. The testimony of the witnesses was that this man was told to dump it over the side, as you always do. I think on board a ship a man is under a greater compulsion by his superiors than he is on land. He is there, he is on the high seas, and whatever they are directed to do, they have to do it. It was for his superiors to decide whether this was to be done or not, and he had to obey it. I think it is a question for the jury to determine as to the negligence, first, whether these orders were given, and whether there was negligence in giving them, and second, whether the plaintiff was guilty of contributory negligence, and third, whether he assumed the risk. I respectfully submit that the case should be submitted to the jury on those issues.

55 The Court: The motion must be granted, the motion to dismiss the complaint.

Mr. Carter: And I ask for the direction of a verdict in behalf of the defendant.

The Court: I grant the motion of counsel for the defendant and direct a verdict for the defendant.

Mr. Graves: I take an exception.

The Clerk: Gentlemen of the Jury, you are directed by the Court to find a verdict for the defendant.

The Court: Just a moment. I will say that I see no proof in this case of any negligence on the part of the owner of this ship. I think that the plaintiff himself assumed the risks incident to the work, and I think further that there was contributory negligence. Under the maritime law, as laid down in the case of Osceola, 189 U. S., page 160, the only obligation of a ship owner would be for maintenance and cure and wages, unless it be shown by some evidence that the ship was not fit for sea because of unseaworthiness. There is no evidence in this case of any unseaworthiness, nor is there any claim or evidence for wages or maintenance or cure. Therefore, the motion must be granted. Counsel for the plaintiff has called my attention to the recent amendment of the United States Statutes known commonly as the Seamen's Act, and he says that by reason of Section 20, which is to the effect that in any suit to recover damages for any injury sustained on board a vessel, or in its service, that a man should not be held to be a fellow-servant with those under their authority. Under the proof in this case,

56 I do not think that there is sufficient evidence before us which raises squarely the point of law presented by counsel for the plaintiff. However, I believe that the section is intended to make the owner of the ship responsible for the act of some person in authority on the ship, such as the captain or the mate of the ship, and has no application to a case such as here presented, where the owner of a ship is charged with negligence, in an alleged negligent command or order given by an assistant engineer in charge for the time being of the fire room or engine room; and for this

reason or for these reasons I feel it encumbent upon me to dismiss this case.

Mr. Graves: Is this the dismissal of the complaint or the direction of a verdict?

The Court: The direction of a verdict. You rest?

Mr. Carter: Yes, I rest.

The Court: And you move a direction?

Mr. Carter: Yes, the direction of a verdict.

Mr. Graves: I ask for leave to go to the jury on all the issues in the case, as outlined in my argument and as contained in the evidence.

The Court: Motion denied.

Mr. Graves: Exception. I except to the denial of my motion to go to the jury on all the issues.

The Court: You take an exception to the direction of the verdict; that preserves your rights there?

Mr. Graves: Yes, and I except to the order of the Court directing a verdict in favor of the defendant.

57 The Court: And you ask to go to the jury on the question of negligence in the case, and on the question of contributory negligence, and have presented to the jury, as a question of fact, the question whether or not this plaintiff did assume the risk of his occupation and the risk of the occasion in question. Motion denied.

Mr. Graves: Yes, that has been denied, and I except to that.

Mr. Graves: Now, I further move that the verdict, which I take it has already been rendered, as directed, be set aside on the ground that it is contrary to law and contrary to the evidence, and contrary to the weight of evidence, and upon all the exceptions taken at the trial of this case.

The Court: The motion is denied.

Mr. Graves: Exception. May I have sixty days' stay and ninety days to make a case?

The Court: I will do better than that, if you will show me any authority or anything that entitles you to go to the jury. I will give you another chance.

Mr. Graves: That is a brand new statute that has never been passed upon. I cannot show you an authority.

Case closed.

The foregoing bill of exceptions contains all the evidence given at the trial.

SILAS B. AXTELL,
Attorney for Plaintiff.

To: Messrs. Carter & Carter, Attorneys for Defendant.

58 *Stipulation as to Bill of Exceptions and Exhibits.*

United States District Court, Southern District of New York.

PETER CHELENTIS, Plaintiff,

against

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant.

It is hereby stipulated that the foregoing Bill of Exceptions contains all the evidence given upon the trial, and that the same be settled and ordered on file.

It is further stipulated that none of the exhibits need be printed, but that same may be submitted to the Circuit Court of Appeals by either party and shall be used by that Court as a true part of the record.

Dated, December 4th, 1916.

SILAS B. AXTELL,
Attorney for Plaintiff.
CARTER & CARTER,
Attorneys for Defendant.

The foregoing bill of exceptions is hereby settled, signed and allowed by me and hereby ordered on file.

Dated, December 15, 1916.

MARTIN T. MANTON,
United States District Judge.

59 *Bond.*

District Court of the United States of America for the Southern District of New York, in the Second Circuit.

PETER CHELENTIS, Plaintiff-appellant,

against

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant-respondent.

Bond on Appeal.

Know all men by these presents, That Peter Chelentis, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Luckenbach Steamship Company, Inc., in the sum of Two Hundred and Fifty ($250.00) Dollars to be paid to the said Luckenbach Steamship Company, Inc., for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by

these presents. Sealed and dated the 6th day of December, 1916.

Whereas, the above named Peter Chelentis, has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above en-
60 titled suit, by a judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Peter Chelentis, shall prosecute said writ to effect, and answer all damages and costs if he fail to make said plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PETER CHELENTIS.
NATIONAL SURETY COMPANY,
By GEO. H. SCHNEIDER,
Resident Vice-President.

Attest:
[SEAL.] E. M. McCARTHY,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 9th day of December, 1916, before me personally came the within named Peter Chelentis, to me known, and known to me to be the individual described in and who executed the within bond and he acknowledged that he executed the same.

[SEAL.] MAURICE K. WISE,
Notary Public, New York Co.,
No. 262, Register's No. 8169.

Certif. filed Kings Co. No. 61. Register's No. 6081. Commission expires March 30, 1918.

61 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of December, 1916, before me personally came Geo. H. Schneider, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Peter Chelentis, as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof, that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Peter Chelentis, is the corporate seal of said National Surety Company,

and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Six Million dollars.

GEO. H. SCHNEIDER.

Signed, sworn to, and acknowledged before me this 6th day of December, 1916.

[SEAL.] H. R. BENNETT,
Notary Public, &c.

62 *Assignments of Error.*

United States District Court, Southern District of New York.

PETER CHELENTIS, Plaintiff,

against

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant.

Now comes the plaintiff, Peter Chelentis, by Silas B. Axtell, and says:

That in the above-entitled cause there are manifest errors which occurred upon the trial of said cause and upon which he will rely in his prosecution of the writ of error in the above-entitled cause and to all of which exceptions were had, to wit:

First. At the conclusion of the testimony and evidence offered by the plaintiff herein, the Trial Court erred in granting the defendant's motion for a non-suit and dismissal of the complaint made upon the grounds that the plaintiff had failed to show any negligence on the part of the defendant; that the plaintiff had failed to show his own freedom from conributory negligence; that plaintiff was injured in a manner and due to a risk incidental to and assumed in the course of his employment and upon the further grounds appearing in the Bill of Exceptions.

Second. At the conclusion of all the evidence herein, the Trial Court erred in granting the defendant's motion for a non-
63 suit and dismissal of the complaint made upon the grounds that the plaintiff had failed to show any negligence on the part of the defendant; that the plaintiff had failed to show his own freedom from contributory negligence; that plaintiff was injured in a manner and due to a risk incidental to and assumed in the course of his employment and upon the further grounds appearing in the Bill of Exceptions.

Third. At the conclusion of the testimony and evidence offered by the plaintiff herein, the Trial Court erred in granting the defendant's motion for a direction of a verdict in favor of the defendant and in directing a verdict in favor of the defendant on the grounds that the plaintiff had failed to show his own freedom from contributory negligence, had failed to show defendant's negligence, and upon the further ground that the injury sustained by the plaintiff, occurred in a manner incidental to and due to an assumed risk of the employment in which plaintiff was engaged and that the plaintiff had assumed the risk thereof, and upon all the other grounds appearing in the Bill of Exceptions.

Fourth. At the conclusion of all the evidence and testimony herein, the Trial Court erred in granting the defendant's motion for a direction of a verdict in favor of the defendant and in directing a verdict in favor of the defendant on the grounds that the plaintiff had failed to show his own freedom from contributory negligence, had failed to show defendant's negligence and upon the further ground that the injury sustained by the plaintiff, occurred in a manner incidental to and due to an assumed risk of the employment in which plaintiff was engaged and that the plaintiff had assumed the risk thereof.

64 Fifth. At the conclusion of the testimony and evidence offered by the plaintiff herein, the Trial Court erred in denying plaintiff's motion for leave to go to the jury upon the questions:

a. As to whether or not plaintiff had shown his own freedom from contributory negligence.

b. As to whether or not plaintiff had assumed the risk of the injury which he sustained and whether the same was due to a risk incidental to and assumed by him in the course of his employment.

c. As to whether or not the defendant was negligent, and as to whether plaintiff was injured by such negligence.

d. As to whether or not the first assistant engineer was a person in defendant's service having command over plaintiff and his co-employees.

e. As to whether or not said first assistant engineer was negligent.

f. As to whether or not plaintiff was injured by reason of the negligence of said first assistant engineer, and in further denying plaintiff's motion for leave to go to the jury upon each and every issue of fact or of law in the case and upon all the grounds or questions appearing in or stated in the record.

Sixth. At the conclusion of all the evidence and testimony offered herein, the Trial Court erred in denying plaintiff's motion for leave to go to the jury upon the questions:

a. As to whether or not plaintiff had shown his own freedom from contributory negligence.

65 *b.* As to whether or not plaintiff had assumed the risk of the injury which he sustained and whether the same was due to a risk incidental to and assumed by him in the course of his employment.

c. As to whether or not the defendant was negligent, and as to whether plaintiff was injured by such negligence.

d. As to whether or not the first assistant engineer was a person in defendant's service having command over plaintiff and his co-employees.

e. As to whether or not said first assistant engineer was negligent.

f. As to whether or not plaintiff was injured by reason of the negligence of said first assistant engineer, and in further denying plaintiff's motion for leave to go to the jury upon each and every issue of fact or of law in the case and upon all the grounds or questions appearing in or stated in the record.

Seventh. That the Trial Court further erred in holding:

a. That plaintiff was guilty of contributory negligence as a matter of law and that there was not sufficient evidence to require the submission to the jury of the question of whether or not plaintiff was free from contributory negligence.

b. In holding as a matter of law that the defendant was not negligent and that there was not sufficient evidence to require the submission to the jury of the question as to whether or not the defendant was negligent.

c. In holding as a matter of law that plaintiff had assumed the risk of the injury which he sustained and that the danger
66 or hazard to which he was subjected was a risk incidental to and arising in the course of his employment, and in holding that there was not sufficient evidence for the submission to the jury of the question as to whether or not such risk was an inherent risk and one which was assumed by the plaintiff.

d. In holding as a matter of law that the first assistant engineer was a fellow servant of the plaintiff and that the plaintiff assumed the risk of his negligence.

e. In holding as a matter of law that all persons on board the vessel were fellow servants of the plaintiff with the exception of the captain and possibly the mate.

f. In holding as a matter of law that the plaintiff was not within the watch of the first assistant engineer and that the first assistant engineer did not have authority to give him instructions which resulted in his being injured, and in holding that there was not sufficient evidence to require the submission to the jury of the question as to whether or not the plaintiff was in the watch of the first assistant engineer and as to whether or not the first assistant engineer had authority to give the orders in question.

Eighth. That the Court further erred:

a. In dismissing the complaint.

b. In directing a verdict for the defendant.

c. In refusing to allow the case to go to the jury upon all the questions raised by the evidence and in refusing to permit the jury to render a general verdict one way or the other.

67 Ninth. That the Trial Court further erred in denying plaintiff's motion that the verdict be set aside and a new trial be granted on the ground that the said verdict was contrary to law, contrary to the evidence, contrary to the weight of evidence and upon all exceptions taken at the trial of the case.

And the said Peter Chelentis prays that the judgment aforesaid

may be reversed and that the District Court be directed to grant a new trial of said cause and that plaintiff be restored to all things that he has lost by reason of said judgment.

SILAS B. AXTELL,
Attorney for Plaintiff.

O. & P. O. Address, 1 Broadway, Borough of Manhattan, City of New York.

68 *Citation.*

By the Honorable Julius M. Mayer, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Luckenbach Steamship Company, Inc., Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 13th day of January, 1917, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Peter Chelentis is plaintiff-in-error and you are defendant-in-error to show cause, if any *they* be, why the Judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 15th day of December, in the year of our Lord One Thousand Nine Hundred and Sixteen, and of the Independence of the United States the One Hundred and Forty-first.

J. M. MAYER,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

69 *Stipulation.*

United States District Court, Southern District of New York.

PETER CHELENTIS, Plaintiff-Appellant,

vs.

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant-Appellee.

It is hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated January 4th, 1917.

SILAS B. AXTELL,
Attorney for Plaintiff-Appellant.
CARTER & CARTER,
Attorneys for Defendant-Appellee.

70 *Clerk's Certificate.*

United States District Court, Southern District of New York.

PETER CHELENTIS, Plaintiff-Appellant,

vs.

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant-Appellee.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 4th day of January, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the said United States the one hundred and forty-first.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

71 United States Circuit Court of Appeals for the Second Circuit, October Term, 1916.

No. 223.

Argued April 11, 1917; Decided May 25, 1917.

PETER CHELENTIS, Plaintiff-in-Error,

v.

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant-in-Error.

In Error to the District Court of the United States for the Southern District of New York.

Before Ward, Rogers, and Hough, Circuit Judges.

WARD, *Circuit Judge:*

This was an action at common law by a seaman employed on the steamer J. L. Luckenbach against her owners to recover damages for personal injuries sustained by him on his second voyage. The only charge of negligence in the complaint as to which there was any proof was as follows:

"* * * because said defendants and said persons in their service having command, negligently and unlawfully compelled plaintiff to carry an ash bag across an open and exposed deck
72 on board said vessel during a severe storm and while the waves were calculated to and did break over the same, plaintiff, although himself in the exercise of due care, was suddenly and without warning struck by a wave with great violence and precipitated from his feet, thereby sustaining severe, painful and permanent personal injuries, as hereinafter more particularly set forth."

The plaintiff sued for full indemnity and on the trial declined to make claim for wages to the end of the voyage and expenses of cure and maintenance for a reasonable time thereafter, insisting that by virtue of Sec. 20 of the Seamen's Act of March 4, 1915, he was entitled to full indemnity and to go to the jury on the question of the defendant's negligence and of his own contributory negligence. This section reads:

"Sec. 20. That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

Judge Manton directed a verdict for the defendant, relying on the decision of the Supreme Court in The Osceola, 189 U. S. 158.

December 26, 1915, the plaintiff Chelentis, a fireman, was in the watch of Snell, the second engineer, 12 to 4 A. M. At 4 A. M. he came on deck, in accordance with the regular practice, to rest for half an hour and then with his mate to take the ashes raked from the fires by the 4 to 8 watch and put into bags lifted by machinery from the stokehole to the grating in the fireroom level with the deck. One man would take a bag off the hoist and deliver it to his mate to be carried by him through the port door of the fireroom out on deck and dumped over the port side.

The only ash hoist was on the port side and there was a coal bunker running across the grating in the fire room from side to side. The cross bunker did not prevent anyone from going through the port door of the fireroom to the port side, but if the bags were
73 to be dumped on the starboard side a third man would be needed, viz., one to take the bag from the hoist and deliver it to another to carry it to and pass it over the cross bunker to a third to carry it from there to the door on the starboard side and dump it over.

At 4.30 A. M. the plaintiff and his mate went to the engine room and asked Keyser, the first assistant engineer in charge of the watch, to give them a third man so that they could dump the ashes over the starboard side, the sea being so high on the port side as to make it dangerous to dump them there. This they testified he refused with oaths and drove them out of the engineroom, ordering them to do the work as usual.

As the plaintiff was returning to the ash hoist after emptying his first bag over the port side, a wave struck him and carried him over to the starboard side, causing him very severe injuries.

The defendant contended that Snell should have been on deck

supervising this operation of dumping the ashes by the men in his own watch and that the plaintiff was not in Keyser's watch or subject to his orders. But the evidence is that Keyser was giving him orders and we are clear that Snell's watch were bound to obey him. After the accident three men were employed and the ashes were dumped over the starboard side.

December 27 the steamer arrived in port and the plaintiff was taken to the Marine Hospital, where he remained three months and four days, it being found necessary to amputate his right leg six inches above his knee.

The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola, supra and although because of these peculiarities such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori. If a seaman who had been locked up or put in irons for
74 disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant such as a cook or chauffeur who had received the same treatment. So a seaman bringing suit in a common law court for personal injuries could recover even if guilty of contributory negligence, although a shore servant suing in the same court could not. And a seaman suing in a common law court for personal injuries could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case, the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance, and cure for a reasonable time thereafter.

Has Congress changed the situation by Sec. 20 of the Seamen's Act, supra, as the plaintiff contends? He argues that the Act makes the master a fellow servant of the seaman and therefore that Congress intended to make the relation between the seaman and all the officers throughout the same as at common law. But the Supreme Court in the case of The Osceola, supra, while reserving the question whether the master and seaman were fellow servants, held that it made no difference whatever in respect to the liability of the shipowners for an improvident order of the master which resulted in personal injuries to the seaman. This was the precise question decided. The facts were that the master ordered a gangway to be hoisted by a derrick and swung outboard when the steamer was proceeding in a strong head wind, so that she might be ready for an immediate dis-

charge of the cargo on arrival. The gangway as soon as it
75 swung clear of the side was turned broadside by the wind and threw down the derrick which struck and injured the libellant. The first and third questions certified to the Supreme Court were answered, "No":

"First: Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel."

* * * * * * *

"Third: Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent."

It follows that whether the master and seaman are fellow servants or not is quite immaterial in the case of a suit for injuries resulting from an improvident order of the master. For this reason the court was right in directing a verdict for the defendant and the judgment is affirmed.

F. R. Graves, for the Plaintiff-in-Error.
Peter Carter, for the Defendant-in-Error.

76 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court-rooms in the Post Office Building in the City of New York, on the 4th Day of June, One Thousand Nine Hundred and Seventeen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

PETER CHELENTIS, Plaintiff in Error,

v.

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
H. W. R.

77 & 78 Endorsed: United States Circuit Court of Appeals, Second Circuit. Peter Chelentis v. Luckenbach S. S. Co. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jun. 4, 1917. William Parkin, Clerk.

79 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 77 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Peter Chelentis against Luckenbach Steamship Company, Inc., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of July in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the said United States the One Hundred and forty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

80 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Peter Chelentis is plaintiff in Error, and Luckenbach Steamship Company, Incorporated, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command
81 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26124. Supreme Court of the United States, October Term, 1917. No. 657. Peter Chelentis vs. Luckenbach Steamship Company, Incorporated. Writ of Certiorari.

82 United States Circuit Court of Appeals for the Second Circuit.

PETER CHELENTIS, Plaintiff-Appellant,

against

LUCKENBACH STEAMSHIP COMPANY, INC., Defendant-Appellee.

It is hereby Stipulated and Agreed, that the certified Transcript of Record on file with the Clerk of the Supreme Court of the United States may be taken as a return to the Writ of Certiorari granted herein October 22nd, 1917, No. 657, October Term, 1917.
Dated, New York, October 31, 1917.

S. B. AXTELL,
Attorney for Plaintiff-Appellant.
CARTER & CARTER,
Attorneys for Defendant-Appellee.

83 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.
Dated, New York, November 1st, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

84 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Peter Chelentis v. Luckenbach Steamship Company. Return to Writ of Certiorari.

85 [Endorsed:] File No. 26,124. Supreme Court U. S., October term, 1917. Term No. 657. Peter Chelentis, Petitioner, vs. Luckenbach Steamship Co., Inc. Writ of certiorari and return. Filed November 10, 1917.

Supreme Court of the United States

PETER CHELENTIS,
Appellant-Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY,
Appellee-Respondent.

Sirs:

PLEASE TAKE NOTICE that on Monday, the 10th day of December, 1917, at the opening of court on that day or as soon thereafter as counsel can be heard, I shall make a motion on the annexed petitions, before the Supreme Court of the United States, that the above-entitled cause be advanced and preferred for a hearing at an early date convenient to the court and I shall then and there ask the court to grant the petitioner such other and further relief in the premises as may be just.

Dated, N. Y., Nov. 22nd, 1917.

Yours, etc.,

FAYETTE B. DOW,
Attorney for Petitioner,
SILAS B. AXTELL,
of Counsel,
1 Broadway,
New York City.

To:

MESSRS. CARTER & CARTER,
15 Whitehall Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

PETER CHELENTIS,
Appellant-Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellee-Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

PETER CHELENTIS, being duly sworn, deposes and says that I am appellant-petitioner in the above-entitled action.

I am a Greek subject, and have been a marine fireman all my life. I know no other kind of work. I am thirty-two years of age, and I have a wife and one child, who are now in Peraz, Greece. Since I was injured on the *J. L. Luckenbach,* December 26th, 1915, I have been totally disabled. For the last five or six months I have tried to use an artificial leg which hooks on below the stub of my right leg, just below the hip, but I cannot walk any distance at all with it, because the stub is so sore and tender.

I have been boarding with one D. Stratas, 57 Van Brunt Street, Brooklyn, and C. Mangellaw Peter Mustachas, 51 Warren Street, Brooklyn, New York, since I left the Marine Hospital at Staten Island, in the latter part of March, 1916. I owe them quite a large sum of money for board and lodging and they have loaned me some cash to help my family in Greece. I have no money whatever to pay for the fees of the Court at Washington, which I am informed by my

attorney, Mr. Axtell, amounts to $145.00 or more. I am going to try to borrow the money or raise it from my friends in some way, but I am totally destitute; I have no clothes and have not earned a cent since this accident happened to me, and therefore I petition the Judges of the Supreme Court of the United States, who I am informed have granted me the right to be heard in that Court, for a preference in this case. My attorney informs me that the case will not be heard in the Supreme Court, if heard in regular order, for a period of over a year. It will be impossible for me to live or sustain myself for that length of time, without some assistance, and I therefore respectfully pray that the application of my attorney on my behalf be granted, and that this case be advanced from its regular order, and be heard, if possible, during the month of ~~December, 1917.~~ January 1918

I have tried to find employment that I could do, and I have applied to the Charity Organization Society in Brooklyn, at the suggestion of my attorney, and to others, but no one has been able to provide me with work that I can perform. Except for a few words, I cannot understand or speak the English language, and this statement is being interpreted for me.

PETER CHELENTIS.

Sworn to before me this
21st day of November, 1917.

LILLIAN ZIMMERMANN.

NOTARY PUBLIC, KINGS COUNTY, N. Y. NO. 20
CERTIFICATE FILED IN NEW YORK COUNTY NO. 35

SUPREME COURT OF THE UNITED STATES.

PETER CHELENTIS,
Appellant-Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellee-Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

SILAS B. AXTELL, being duly sworn, deposes and says that he is attorney of record for the appellant-petitioner, Peter Chelentis, in the above-entitled action.

That heretofore on or about the 12th day of October, 1916, this cause of action for damages was brought to trial by the Plaintiff, in the United States District Court, Southern District of New York, before District Judge Manton.

At the end of the plaintiff's case the trial court granted a motion to dismiss the complaint. An appeal was duly taken to the United States Circuit Court of Appeals, and a decision was handed down by that court and an opinion written by Judge Ward on the 26th day of May, 1917.

From this decision an application was made by the appellant-petitioner to this Court for a writ of certiorari, and the petition of the appellant herein was granted by this Court on the 23rd day of October, 1917.

This is an action for personal injuries to the appellant for damages sustained by the loss or am-

putation of his right leg, the amputation having been made between the hip joint and the knee.

The appellant-petitioner hereby petitions this court to advance this cause upon the calendar of this court, in order that the questions of law involved herein may be determined at an early date.

The petitioner herein bases his claim for preference or advancement on the following grounds:

1. The utter and complete destitution of the appellant-petitioner himself.

2. On the ground that there are a large number of other seafarers who are suffering from serious permanent injuries, who are likewise totally destitute and without means of support, pending a decision of the questions of law involved in this case.

3. On the ground that the decision of the questions of law involved herein greatly affect the interest and welfare of all seafarers who are engaged in the performance of labor on any vessel of the United States, as well as the financial interest of the owners of such vessels.

As to the destitution of the appellant-petitioner above mentioned, your deponent refers to the affidavit of Peter Chelentis, himself, which is annexed hereto and is part of the moving papers. Nearly ~~three~~ two years have elapsed since this accident occurred. During all of that time, although the greatest of diligence has been exercised by his attorney, your deponent, the appellant-petitioner has been a public or private ward of charity. Your deponent has read the affidavit of Peter Chelentis and believes it is true, and states in addition thereto that he has seen the said Peter Chelentis at his office at #1

Broadway on innumerable occasions, and that at no time, to the best of your deponent's information and belief, has the said Peter Chelentis been able to perform labor of any kind, nor earn a living in any way, and at no time has he to your deponent's knowledge or belief been employed; that it is a fact that said Chelentis cannot speak, read nor write the English language, and that for that reason it has been extremely difficult, in fact impossible, to find any employment at which he could earn a living or partially support himself.

Your deponent is informed and believes, that said Peter Chelentis is not sufficiently clothed, and that he is in want of sufficient food. He knows from his observation that said Chelentis is thin, worn and emaciated in appearance. His clothes are ragged and tattered and he appears to be in want of the necessities of life itself.

Your deponent is informed and believes that except for the charity and friendship of certain Greek boarding house keepers, who are mentioned in Chelentis' affidavit, it would have been impossible for him to have maintained life in his body during the past three years.

Substantiating the second ground, above mentioned, for preference herein, deponent alleges that for the last eight years he has been practising in the Admiralty Court and specializing on the claims of seamen or seafarers. For the greater part of this time he has been in court as an attorney for the Seamen's Branch of the Legal Aid Society, but at the present time your deponent has in his office probably forty cases of seafarers who have been seriously injured in the performance of duty through the negligence of seamen in command; that action has been commenced in each instance on behalf of the seamen in the Common Law Court of the State of New York, or of the United States.

In the case of Hanrahan v. Pacific Transportation Company, in the Southern District of New York, Judge A. N. Hand held that where an injury resulted to the plaintiff, an oiler on the ship *Alvarado,* wholly incapacitating him for life, and it appearing that the injury was due to the negligence of the captain or first officer, in failing to have used certain appliances that were on board the ship, that the plaintiff could not recover at common law in view of the recent decision of Judge Ward in the matter of Chelentis v. Luckenbach Steamship Company. The complaint was accordingly dismissed and an appeal has been taken.

Your deponent knows of forty cases in his own office, in which the rights of seafarers are affected by this decision of the Circuit Court of Appeals in the Chelentis case, and where no recovery can be effected for them until that decision is reversed by this court.

It is a matter of common knowledge that due to the recent great increases in tonnage of vessels flying the flag of the United States, there are thousands of seamen employed by the American ship owners or the Shipping Board of the United States, in danger of the hazards of their employment, who are constantly being injured through negligence, careless orders of officers, mates, engineers and assistant engineers, who direct and command them. It is only reasonable to suppose that many of these seamen are represented by other attorneys in other ports of the United States, and that there are many hundreds of destitute seamen at the present time in ports and cities of the United States wards of public or private charity, as is this appellant, due to the fact that no adequate remedy exists by Statute, in Admiralty or at Common law.

Supporting the third ground pleaded by this appellant, as good cause for advancement in addi-

tion to what has already been set forth, deponent respectfully calls attention to the fact that Congress has failed to provide a compensation act which will benefit seamen; that the calling of seafarers is one of the most dangerous in the world, that due to the fact that seafarers are taken out on long voyages, far from the seat and hand of authority, except that of the officers who command them, they are more than any other class in the world subject to abuse, subject to the risk of injury on account of the negligence of the seamen in command over them, in failing to act at all or by acting improperly, negligently or unwisely.

Had Congress seen fit to enact a Federal Compensation Act, of which this petitioner could avail himself, or had he any adequate remedy other than by this action at common law, the advancement of this case would not be pleaded now.

In closing, deponent respectfully calls the attention of this court to the harsh ruling of the Circuit Court of Appeals and the District Court in this instance. Secondly, the theory of liability, as laid down by Judge Ward, seems to be an anomalous theory. A careful search of the decision of other judges in the District Courts and the Circuit Courts of the United States fails to disclose that his view is shared or has been shared by any other Judges. Lastly, that even a casual reading of the decision of this court in the matter of the *Osceola*, reported 189 Fed., 158, indicates that this court has found that the limit of liability of a vessel of the United States, *in actions in rem*, alone, is determined by that decision, which specifically omits to determine the liability of *ship owners* in an action in *Admiralty in personam*, or in a personal action at common law.

It is respectfully submitted that even a casual reading of the decision of the Supreme Court in

the *Osceola* case indicates that the courts there found, that in an action *in rem*, an American vessel was not liable for damages incidental to the negligence of an officer of the vessel, because the officer and seamen were deemed to be fellow-servants.

For all of these reasons deponent prays that relief be granted to appellant-petitioner in this case, and that this case be brought on for argument during the month of December, 1917, or January, 1918.

S. B. AXTELL.

Sworn to before me this
26th day of November, 1917.
Lillian Zimmerman
Notary Public,
Kings County, N. Y., No. 20.
Certificate filed in New York County, No. 35.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

C. MANOLESCU, being duly sworn, deposes and says: Peter Chelentis has lived with me for about fifteen months; I kept him, expecting his case to be tried in court. He cannot work, as his leg is off. He used to help me peel potatoes, but he would be in the way, as he had to use his cane or crutches, and I had to give him money to buy clothes. He still lives in the house, but I have sold the boarding house to Peter Russo, who has promised to keep Chelentis until his case is appealed.

Chelentis has complained of severe pains due to the fact that his hip still hurts him and he cannot get an artificial leg that will not push against his thigh and make it sore after he has walked on it for a while.

Last week I bought Chelentis a suit for $16.00; he owes me about $600.00 for the artificial leg, board, tobacco, laundry and medicines. He also owes Mr. Russo about $50.00.

We kept Chelentis because he could not speak English very good and no one would hire him, as he was a cripple, and will be for life.

C. MANOLESCU.

Sworn to before me this
28th day of November, 1917.

WILLIAM F. BLACK,
Notary Public,
New York County, 475.
(Seal)

Supreme Court of the United States

OCTOBER TERM, 1917.

PETER CHELENTIS,
Plaintiff-Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Defendant-Respondent.

PLEASE TAKE NOTICE that the annexed petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit will be submitted to the Supreme Court of the United States at the opening of court on October 1st, 1917, or so soon thereafter as counsel may be heard.

Dated July 16, 1917.

FAYETTE B. DOW,
Counsel for Petitioner.

To:

CARTER & CARTER, Esquires,
Counsel for Respondent.

TO THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

The petition of PETER CHELENTIS for a Writ of Certiorari, directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of

PETER CHELENTIS,
Plaintiff and Appellant,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Defendant and Appellee.

Your petitioner, PETER CHELENTIS, respectfully shows to this Court as follows:

I. Your petitioner was at the time of the commencement of this suit a resident of the State of New York and the defendant was and is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Delaware.

II. That your petitioner is a fireman and was in December, 1915, and had been for some time prior thereto, in the employ of the defendant as a fireman on the steamship *J. L. Luckenbach*, a vessel operated and controlled by the defendant.

III. On December 26th, 1915, while petitioner was so employed, and while the said vessel was on the high seas, it became necessary for petitioner to assist in the dumping of ashes. The method of dumping ashes was to hoist them up in bags by means of a winch from the bottom of the fire room to the top of the fire room on deck. The gratings or portion of the fire room on a level with the deck were covered with a superstructure or house, on each side of which there was a door. The winch was situated on the port side of the house. In order to dump ashes on the starboard side, it was necessary to have three men, one to hoist the ashes, another to lift and hand them over to a cross-bunker in the middle of the house and a third to receive them on the other side and carry them across the deck and dump them overboard. On the port side but two men were necessary, for the reason that there was no cross-bunker between the winch and the port door of the superstructure. On the morning of December 26th, 1915, petitioner's watch ended at 4 o'clock, but, according to his customary habit, he remained to dump ashes. Petitioner went on deck and observed that the weather was very rough on the port side of the vessel and that waves were breaking on the deck on that side of the superstructure, and he did not think it safe to carry ashes across the deck on the port side of the vessel, and therefore went below and asked the first assistant engineer to give them a third man in order that they might dump the ashes over the starboard side of the vessel, which was free from waves. The first assistant engineer refused to furnish the third man and, on the contrary, expressly ordered the petitioner and his mate to dump the ashes over the port side, emphasizing his order by threats of physical violence.

IV. Upon receiving this order, petitioner proceeded, with the help of his mate, one Nicholas, to dump the ashes. His mate raised the bag of ashes by means of the winch and petitioner receiving it at the port door of the superstructure, proceeded to carry it across the deck, dumped the ashes and attempted to return. On his way back a large wave broke over the port side of the vessel, and, overtaking him, knocked him down and carried him to the rear of the superstructure and clear to the other side of the vessel, throwing him under some pipes and breaking his leg in three places.

V. That petitioner was then treated by the officers of the vessel and when the vessel reached New York, on the following day, he was taken to the Marine Hospital, where he remained two or three months. During the time he was there it became necessary to amputate his leg at a point six inches above the knee.

VI. That while petitioner was employed, his work was done in the engine room department of the vessel, where he was under the supervision of a chief engineer and a first, second and third assistant engineers. The custom prevailing in this department was for one engineer to be on watch at a time, the watch being for four hours, and during that time such engineer had sole and complete charge of the engine room and fire room.

VII. On the day of the accident above mentioned, your petitioner was in the watch from 12 o'clock midnight to 4 A. M. This watch was in charge of the second assistant engineer, one Snell. It had been and was a custom of your petitioner to

remain over for a half an hour after the expiration of his watch, to dump the accumulated ashes. On the day in question, he remained after the expiration of his watch and during the first half hour of the watch of the first assistant engineer, one Kayser, thus becoming subject to the orders of said Kayser in the dumping of the ashes.

VIII. On or about May 25th, 1916, an action was commenced in the Supreme Court of the State of New York, triable in the County of New York, by your petitioner as plaintiff, against Luckenbach Company, Inc., and Luckenbach Steamship Company, Inc., defendants, to recover $50,000 damages for his injuries received as above set forth. That the complaint in said action will be found on pages 4 to 7 of the record herein and sets forth the facts as above stated.

IX. That thereafter and on June 7th, 1916, an order was entered in the office of the Clerk of the County of New York, on the consent of the attorney for your petitioner, transferring this case for trial to the United States District Court for the Southern District of New York, on the ground that the defendants were foreign corporations existing under and by virtue of the laws of Delaware, and the cause was therefore so removed.

X. That thereafter and on or about July 17th, 1916, the defendants interposed answers setting forth that at the time of the accident the ship was owned by Luckenbach Company, Inc., and leased to Luckenbach Steamship Company, Inc., which was in control thereof as owner *pro hac vice;* defendants denied the allegations of the complaint and set up the defenses of contributory negligence,

the fellow-servant rule and assumption of risk, and further alleged that under the Maritime Law defendants were liable only for the expenses of the maintenance and cure of plaintiff.

XI. On or about October 12th, 1916, the said action came on for trial before Hon. Martin T. Manton, District Judge for the Southern District of New York, and a jury. The action was withdrawn as to Luckenbach Company, Inc., the defendants' counsel having conceded that the plaintiff was employed by Luckenbach Steamship Company, Inc., as were all the other members of the crew, and that Luckenbach Steamship Company, Inc., was in absolute control of the vessel at the time of the accident. That testimony was taken by the plaintiff substantiating the facts as above set forth regarding the accident, and at the close of plaintiff's case, defendant's motion for the direction of a verdict was granted and plaintiff's motion to go to the jury was denied. An exception to this was duly taken by the plaintiff and a motion to set aside the verdict was also denied and excepted to.

XII. That the learned Court, in directing a verdict for the defendant, proceeded upon the theory that the case, though brought in common law, was subject to the rules of the maritime law, and under the rule laid down in *The Osceola,* 189 U. S., 158, the ship was liable only for the expenses of maintenance and cure, unseaworthiness not having been proven; that Section 20 of the Seamen's Act, which provides that "in any suit to recover damages for an injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their au-

thority," had no application, for the reason that an assistant engineer in charge could not be considered a "seaman in command" within the meaning of that statute, but that only a captain or a mate could be considered a "seaman in command."

XIII. That thereafter and on October 19th, 1916, judgment was entered herein by the Clerk of the United States District Court for the Southern District of New York, upon the said direction of verdict, in favor of the defendant and against the plaintiff, your petitioner, in the sum of $78 costs.

XIV. Error was duly assigned and a writ of error duly allowed on December 15th, 1916, by J. M. Mayer, United States District Judge, and thereafter a certified transcript of the record and all proceedings in the said case was duly transmitted to the United States Circuit Court of Appeals for the Second Circuit.

XV. That during the October Term, 1916 (in March, 1917), the appeal was duly argued by counsel for all parties before Judges Ward, Rogers and Hough, and thereafter said Circuit Court of Appeals rendered and filed an opinion and decision, written by Judge Ward, which among other things held that your petitioner was bound by the rules of the admiralty law, and not by the common law; that the contract of the plaintiff being maritime, was the same in every court; that under the rule laid down in *The Osceola, supra,* it made no difference whether or not your petitioner and the engineer were fellow-servants and therefore Section 20 of the Seamen's Act, which your petitioner contends does away with the fellow-servant rule

herein, could have no application. Said Court accordingly affirmed the judgment against your petitioner.

XVI. That on June 4th, 1917, and pursuant to an order made on said day, a mandate was duly issued out of the said Circuit Court of Appeals and was duly filed in the office of the Clerk of the United States District Court for the Southern District of New York, affirming the judgment appealed from.

XVII. On or about June 8th, 1917, an order was duly made by the said United States District Court, and entered in the office of the Clerk of said Court on the same day, which, among other things, ordered, adjudged and decreed that the mandate of the said Circuit Court of Appeals be and it thereby was made the decree of the said District Court, and that the decree of the said District Court entered therein on October 19th, 1916, be and it thereby was affirmed, with costs against your petitioner, which were taxed at $40.75.

XVIII. The questions and propositions of law involved in this case are as follows:

1. Are the rights of a seaman, suing at common law, for damages for personal injuries, claimed to have been caused by the negligence of the ship owner, limited by the admiralty rule allowing a recovery of the expenses of maintenance and cure only, or may he recover full indemnity?

2. Does Section 20 of the Seamen's Act (U. S. Compiled Stat., 1916, Sec. 8337a), which provides that "in any suit to recover damages for an injury sustained on board a vessel or in its service, sea-

men having command shall not be held to be fellow-servants with those under their authority," abolish the fellow-servant rule as a defense to an action at common law, as between a first assistant engineer in sole command of the engine room of a ship and a seaman subject to and acting under his authority?

3. Do the doctrines of assumption of risk and contributory negligence bar recovery in an action at common law by a seaman employed as fireman who is injured on board a vessel while performing a duty by order of and in the manner directed by a first assistant engineer in charge of the engine room of the vessel and who is authorized to give this order in the course of his duty?

4. Assuming that the rule laid down in the case of *The Osceola* (*supra*) applies to an action at common law, does Section 20 of the Seamen's Act create a liability of the employer of the seaman for injuries to the seaman caused solely by the negligence of a seaman in command?

And your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

1. Because federal questions are involved, viz.: Are the rights of a seaman suing at common law for damages for injuries, limited by the rules of admiralty actions *in rem* as laid down in the case of *The Osceola?* Does Section 20 of the Seamen's Act create a liability of the employer for injuries received in cases where it applies; and is a first assistant engineer who is in sole charge of the engine room of a vessel a seaman in command within the meaning of that statute?

2. Because the effect of the decision sought to be reviewed herein is to render nugatory a valuable

remedial statute, and if that decision is allowed to stand, Section 20 of the Seamen's Act is altogether meaningless.

3. Because the questions of law involved herein have not been passed upon by this Court.

4. Because there is a conflict in the decisions of the lower courts as to whether or not the fellow-servant rule is the foundation of the doctrine laid down in *The Osceola*, and, therefore, a conflict as to the application of Section 20 of the Seamen's Act.

5. Because the public interests and the interests of jurisprudence require the decision of this Court upon the questions of law involved herein.

6. Because in view of the large number of persons engaged in occupations similar to that of petitioner, the questions herein involved are of sufficient, general, national and material importance as to make it necessary that they be determined by the Court of last resort.

7. Because the interests of navigation will be benefited by having this Court pass upon and determine the exact rights existing in this respect between shipowners and seamen.

WHEREFORE, petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as may seem just and proper in the premises.

Peter Chelentes

Petitioner.

Fayette B. Dow.

Counsel for Petitioner.

STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

PETER CHELENTIS, being duly sworn, deposes and says: I have read the foregoing petition. The same is true to my own knowledge, information and belief; my knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the Court in which this action has been heard.

Peter Chelentis

Sworn to before me this
26 day of July, 1917.

(L. S.)

ARTHUR LAVENBURG
NOTARY PUBLIC—BRONX COUNTY No. 57
CERT'D [illegible] FILED IN NEW YORK COUNTY No. 200

I HEREBY CERTIFY that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this Court.

Fayette B. Dow
Counsel for Petitioner.

BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

I.

Are the rights of a seaman suing at common law for damages for personal injuries claimed to have been caused by the negligence of the shipowner, limited by the admiralty rule allowing a recovery of the expenses of maintenance and cure only, or may he recover full indemnity?

Or does the decision of this Court in *The Osceola* (*post*) apply in an action brought at common law upon the same facts?

The above question is not entirely new to this Court. While it has never been passed upon in a case involving the rights of a seaman suing for injuries received because of negligence, the Court has had occasion to advert to it many times in other cases.

In view of the recent decision of this Court in *Jensen* v. *Southern Pacific Co.* (decided May 21st, 1917), it is hardly necessary to go into any extended discussion of the applicability of the common law to maritime cases when brought within it. However, we shall briefly review the authorities upon which plaintiff's case stands.

To start at the beginning, the jurisdiction of our admiralty courts has its basis in the constitutional provision extending the judicial power of the Federal Government "to all cases of admiralty and maritime jurisdiction." This provision does not confer exclusive jurisdiction upon these courts in all maritime matters.

Jensen v. *Southern Pacific Co., supra.*
The Hamilton, 207 U. S., 398-404; and other cases *post.*

This constitutional provision was followed by the Judiciary Act of 1789 (Judicial Code 24 and 546) "saving to all suitors the right of a common law remedy where the common law is competent to give it," and must be read in connection with that statute.

Jensen case and *The Hamilton, supra.*

Just what this saving clause means is the question involved in this case. This Court has held that all rights at common law are reserved for the benefit of a maritime litigant and that he has the option of bringing his suit either in a common law court or in an admiralty court, the admiralty jurisdiction *in rem* being the only exclusive jurisdiction granted to the Federal courts.

The Hamilton, supra.
The Max Morris, 137 U. S., 1.

In *American Steamboat Co.* v. *Chase,* 16 Wall., 522, action was brought in a state court for damages arising out of the death of plaintiff's intestate on the high seas, and error was assigned as follows:

> "That the common law courts cannot exercise jurisdiction and give a remedy for consequential injury, growing out of a marine tort, where no remedy for such an injury exists in the admiralty courts."

Of this Mr. Justice CLIFFORD said, page 530:

> "Where no remedy exists for an injury in the admiralty courts, the fact that such

courts exist and exercise jurisdiction in other causes of action leave the state courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the constitution and had no existence in our jurisprudence."

Again he says, at page 532:

"Sufficient has already been remarked to show that the state courts have jurisdiction if the admiralty courts have no jurisdiction, and a few observations will serve to show that the jurisdiction of the state courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of the topic cannot be necessary, as several decisions of this court have established that rule as applicable in all cases where the action in the state court is in form a common law action against the person, without any of the ingredients of a proceeding *in rem* to enforce a maritime lien. Where the suit is *in rem* against the thing, the original jurisdiction is exclusive in the district courts, as provided in the 9th section of the judiciary act; but when the suit is *in personam* against the owner, the party seeking redress may proceed by libel in the district court, or he may, at his election, proceed in an action at law, either in the circuit court, if he and the defendant are citizens of different states, or in a state court as in other cases of actions cognizable in the state and federal courts exercising jurisdiction in common law cases, as provided in the 11th section of the judiciary act. *Leon* v. *Galceran*, 11 Wall., 188."

In *The Hamilton,* 207 U. S., 398, at page 404, Mr. Justice HOLMES, speaking for the Court, says:

> "The grant of admiralty jurisdiction followed and construed by the Judiciary Act of 1789, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, Rev. Stats. 563 Cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, has always been admitted. *Martin* v. *Hunter,* 1 Wheat., 304, 337; *The Hine* v. *Trevor,* 4 Wall., 555-571; *Leon* v. *Galceran,* 11 Wall., 185; *Manchester* v. *Massachusetts,* 139 U. S., 240, 262."

And (same page):

> "Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American Steamboat Co.* v. *Chase,* 16 Wall., 522. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean notwithstanding some expressions of doubt. The same conclusion was reached in *McDonald* v. *Mallory,* 77 N. Y., 546, where the death occurred on the high seas."

In *McDonald* v. *Mallory* (*supra*), the New York Court of Appeals, speaking through Mr. Justice RAPALLO, in deciding that the state courts have jurisdiction over torts committed on the high seas, says at page 556:

> "There is nothing in the nature of this action which renders it exclusively the subject of federal cognizance. The jurisdiction

> of the States and of the United States in the matter of personal torts committed at sea, such as assaults by a master on his crew, injuries to passengers and the like, are concurrent, though remedies by proceedings *in rem* can be administered only by the courts of admiralty of the United States."

This case, while not reviewed by this Court, has been approved many times in other cases.

In *Jensen* v. *Southern Pacific Co., supra,* this Court, while holding the New York Compensation Law unconstitutional as applied to maritime matters, has reaffirmed the right of a maritime litigant to select the forum in which his case shall be decided. We submit that the gist of that decision is found in the final paragraph of the prevailing opinion, as follows:

> "The remedy which the compensation statute gives is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

If the Compensation Law had been a part of the common law, the decision might have been different. But this law did not attempt to amend the common law. It provided that if the employer complied with certain requirements regarding insurance, the employee would have no common law remedy, but would be compelled to accept the compensation; and that if the employer failed to meet the requirements regarding insurance, the employee would have the option of suing at common law or suing for compensation.

It was, therefore, a remedy separate and apart from the common law, and thus not within the saving clause.

But that is not the case here. Plaintiff asks that his common law rights be adjudicated the same as if admiralty courts had no place in our government.

Now, assuming, as in the present case, that a seaman having a claim in admiralty for the expenses of his maintenance and cure, and, having reserved to him by the constitution and statutes the right of pursuing a common law remedy, waives the former and decides upon the latter course, what law shall be applied in determining his case? If the law be the same in both courts, obviously the saving clause is of little value to him, but if each court has its own peculiar rules, he may select the one most favorable to him.

That this Court has applied in maritime cases, the law of the court in which the plaintiff or libelant has chosen to be heard, rather than the general rules of admiralty, is clear to be seen from many of its decisions.

If it happen, as in cases hereinafter mentioned, that a litigant select the court having rules which he deems unsatisfactory, he may not ask that court to administer the rules of the other court. He is bound by his choice.

Atlee v. *Packet Co.*, 21 Wall., 389-395.

Adversely, why should he not have the benefit of the favorable rule when that rule is the rule of the forum selected?

Atlee v. *Packet Co.*, 21 Wall., 389, was a libel in admiralty to recover damage sustained by libelant's scow in colliding with a stone pier built in the navigable waters of the Mississippi River. It

was contended by the claimant that he had a right at common law, being the owner of the land and the riparian rights, to build his pier as he saw fit and that he was not liable for damages to persons who were injured thereby. But this Court held that the admiralty law applied to the matters in dispute, the action having been brought in an admiralty court.

Mr. Justice MILLER at page 395 says:

> "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case notwithstanding the concurrent right to sue at law. In this court, the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common law court the defendant must pay all the damages or none. If there has been on the part of the plaintiff such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the Admiralty Court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum."

Applying this reasoning, the Court there proceeded to administer the admiralty rules and decreed to the libelant one-half of his damage.

The same rule was applied in *The Max Morris,* 137 U. S., 1, which was a libel *in rem* by the employee of a stevedore, to recover damages for injuries received by falling on the vessel, claimed to have been caused by the negligence of those in charge of the ship in removing a ladder. It was held that, as the case was brought in the admiralty jurisdiction and as the plaintiff was guilty of contributory negligence, the damage should be assessed half against the ship and half against the libelant.

The question has also arisen in a common law case.

In *Belden* v. *Chase,* 150 U. S., 674, there had been a collision between two ships on the Hudson River and the owner of the *Vanderbilt* chose to sue the owner of the *Yosemite* in the Supreme Court of New York rather than in the admiralty courts.

The Court, speaking through Mr. Chief Justice FULLER, says at page 691:

> "The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision, has long prevailed in England and other countries. *The Max Morris,* 137 U. S., 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee* v. *Packet Co.,* 21 Wall., 389.
>
> In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or in other words, he could not recover though defendant were negligent, if it appeared that his

> own negligence directly contributed to the result complained of."

Again in *American Steamboat Co.* v. *Chase, supra,* at page 534, the Court, by Mr. Justice CLIFFORD, lays down clearly the difference existing between the two courts having concurrent jurisdiction:

> "Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he must conform to the system of pleading and to the rules of practice, and of evidence which prevail in the chosen forum. State statutes if applicable to the case, constitute the rules of decision in common law actions, in the circuit courts as well as in the state courts, but the rules of pleading, practice and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court. State legislatures may regulate the practice, proceedings and rules of evidence in their own courts, and those rules, under the 34th section of the judiciary act, become in suits at common law, the rules of decision where they apply, in the circuit courts."

A well-reasoned opinion which, although not binding on this Court, is entitled to some consideration, will be found in *Meritt* v. *Tice,* 77 N. Y. App. Div., 326. The action was brought to recover the compensation of plaintiffs as salvors of a ship, but the Court held that it, being a common law court, knew not the rule of the admiralty regarding salvage and therefore confined the recovery to the value of the work, labor and services upon the contract covering these items.

In the present case both the Trial Judge and the Circuit Court of Appeals decided against the plain-

tiff on the theory that the admiralty rule laid down in *The Osceola,* 189 U. S., 158, applied to the present case, that rule being to the effect that under the maritime law, a ship is not liable to a seaman who is injured because of a negligent or improvident order given by the master.

But that was a libel *in rem,* while this is an action at common law.

In the first paragraph of *The Osceola,* Mr. Justice BROWN said enough to make it certain that he considered a different set of rules applying to libels *in rem* than to those *in personam,* or at common law. Page 168:

> "As this is a libel *in rem,* it is unnecessary to determine whether the owners would be liable to an action *in personam,* either in admiralty or at common law, although cases upon this subject are not wholly irrelevant."

In the decision of the Circuit Court of Appeals in the present case, the following statement of the law will be found (Record, p. 73):

> "The contract of a seaman is maritime, and has written into it those peculiar features of the maritime law, that were considered in the case of *The Osceola* (*supra*), and although because of these peculiarities such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law."

It is respectfully submitted that *The Osceola* being an admiralty case, decided upon the principles of the admiralty law, does not and cannot apply to a case like the present, where the seaman has waived his rights in admiralty and chosen to pro-

ceed upon the common law remedy secured to him by the section of the Judiciary Act above referred to, and that this Court should grant a writ of certiorari to review this question.

II.

Does Section 20 of the Seamen's Act (U. S. Comp. St., 1916, Sec. 8337a), which provides that "in any suit to recover damages for an injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority," abolish the fellow-servant rule as a defense to an action at common law as between a first assistant engineer in sole command of the engine room of a ship and a seaman subject to and acting under his authority?

The evidence adduced by the plaintiff at the trial clearly showed that plaintiff was under and subject to the orders of one Kayser, who was first assistant engineer and in charge of the watch during which the accident occurred. True, the plaintiff was not in Kayser's watch, so far as the records of the ship might show—he was in the preceding one—but he had stayed over into Kayser's watch, as was the custom, in order to dump the accumulated ashes. He was in every sense of the word subject to the orders and authority of Kayser, and Kayser most certainly was in command so far as plaintiff was concerned. Certainly Kayser was the best judge of this, and it was he who gave the order in question and insisted upon its being obeyed by the plain-

tiff; and both the Trial Judge and the Circuit Court of Appeals found that the plaintiff was subject to the authority of Kayser.

The section quoted in the above question will be found in U. S. Compiled Statutes, Section 8337a, and, being a new one, has never been passed upon by this Court. However, numerous State decisions have been made construing similar statutes, and while they are not conclusive in this case, they are not wholly irrelevant.

Thus, New York has a statute providing that the employer shall be liable for injuries caused "by reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence" (Labor Law, Sec. 200).

It is submitted that the meaning of that statute is substantially the same as the one concerned in this case, "in command" being more of a maritime term and corresponding to the land expression "exercising superintendence."

That statute has been many times construed. In *Proctor & Gamble Co.* v. *Williams,* 106 C. C. A., 45, it was held (following the construction placed upon it by the State Courts) that the purpose of the statute was to secure proper superintendence for all workmen; that it was not necessary that a person be formally authorized by the employer to be such a superintendent, but that the statute should be liberally construed to include all persons in the employ of the master having duties as foremen, superintendents and the like.

And in *Guilmartin* v. *Solway Process Co.,* 189 N. Y., 490, it was held that if the order which caused the injury was even a mere detail of the superintendent's work, the employer would be liable. At any rate it would appear from this case

that the question whether or not the person was exercising superintendence is for the jury.

In *McHugh* v. *Manhattan R. Co.*, 179 N. Y., 378, it was held that a train dispatcher acts as a superintendent in sending out a train.

In *Cashmore* v. *Peerless Motor Car Co.*, 154 N. Y. App. Div., 814, it was held that an employer is liable for the acts of a servant entrusted with authority to direct, control or command another employee in the discharge of his duty, no matter how limited that authority might be.

In *Markin* v. *Burke*, 212 Fed., 148, it was held that the negligence of a blasting foreman rendered the master liable.

At any rate, the question as to whether or not a certain person is a superintendent is for the jury.

McBride v. *N. Y. Tunnel Co.*, 113 A. D., 821.

Device v. *Hayward*, 128 A. D., 705.

In *Williams* v. *Citizens Steamboat Co.*, 122 A. D., 188, it was held that a master might have and be liable for the acts of many superintendents, each supreme within his own sphere of action.

Thus the tendency of the Courts is to liberally construe the act in order to extend the rights of the employee as far as is consistent with it.

It was contended on the trial that a "seaman in command" could be only a captain or mate of a ship. But the very words used by Congress in the act negative this proposition. If such a meaning had been intended, Congress would have used the word "officer" instead of what it did use.

The term "seaman" according to Black's Law Dictionary and Funk & Wagnall's Standard Dictionary, includes every person who aids in the navi-

gation of a ship *with the exception of the officers,* and it is defined by the Seamen's Act in Section 8392, U. S. Compiled Stat., 1916 (Sec. 4612 R. S.) as follows:

> "In the construction of this Title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; *and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a seaman.*"

We respectfully submit that Kayser, the first assistant engineer, was under the facts of the case a "seaman in command" within the meaning of the statute, and therefore not a fellow-servant with the plaintiff, and that this Court should grant the writ of certiorari in order that it may interpret this act.

III.

Does the doctrine of assumption of risk apply to a seaman who is injured on board a vessel while performing a duty by order of and in the manner directed by a first assistant engineer in charge of the vessel who is authorized to give the order?

It was shown at the trial that when plaintiff came up onto the deck to dump the ashes, he saw the dangerous sea running on the port side of the ship, where the ashes had to be dumped; that he then went to the engineer in charge of the watch and asked for another man to help him and his

mate with the job; that this request was refused and the engineer ordered him to proceed with the work in the regular way, enforcing his order with threats of physical violence, and that plaintiff was injured while carrying out this order. The regular way was to dump them on the port side, where two men could do the job, whereas to dump them on the starboard side required three men, owing to the presence of a cross-bunker, over which the bags of ashes had to be lifted.

These facts were found to be true by the Circuit Court of Appeals.

The defendant's counsel contended at the trial that plaintiff voluntarily assumed the risks of his employment. The learned Trial Judge agreed with him, and he considered the protest of the plaintiff against doing the work in the manner directed important only in so far as it showed that he knew of the risk of being washed overboard by the heavy seas. He seemed to assume that plaintiff should have refused to obey the order. Thus, at the close of the trial, the following dialogue ensued between Court and counsel (Record, p. 53), Mr. Graves being the plaintiff's trial counsel:

> "The Court: Where is your negligence?
>
> Mr. Graves: The direct testimony is that the order was to dump it over the port side.
>
> The Court: Suppose he was told to jump overboard, is he compelled to do that?
>
> Mr. Graves: No, but this is an order given in the navigation of the ship.
>
> The Court: Suppose he told him to go over and strike another man. Does he have to do that?
>
> Mr. Graves: Well, my contention is that that is a question for the jury. Of course, you are putting an extreme case. As I understand it they have to do practically

everything they are told to do on board a ship.

The Court: That may be the practice, but the law must be observed."

Now, what is the law that must be observed? If a seaman is allowed to consider the advisability of obeying every order that is given, the discipline on ships must go by the board. Plaintiff was not in the position of a landsman who might give up his position at will and seek other employment. He was on the high seas, bound by his shipping articles and by the rules of discipline in force there. *He could not refuse to obey.* His protest was overruled, and he must needs be guilty of mutiny or obey his order—and he obeyed.

Shall he now be told that he voluntarily assumed the risk of injury arising out of the dangerous situation which was so clear to him?

The answer to this is found in a few well reasoned cases, and in *Labatt on Master & Servant,* Vol. 3, Sec. 1201, where, in discussing the question of assumption of risk by a seaman, that author says:

> "It is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landmen are theoretically supposed to possess, of abandoning their employment the moment they are exposed to an abnormal risk."

In *Thompson* v. *Herman,* 47 Wisc., 602, the plaintiff, a seaman, was injured while adjusting certain of the rigging under the master's direction. He had protested against the method employed as being highly dangerous, but obeyed the imperative orders of the master to do the work as first suggested.

The Supreme Court of Wisconsin held that the seaman had not assumed the risk, saying at page 609:

> "The plaintiff avers that he used care, or was not in fault, in attempting with others to execute the orders of the master, and that he submitted to the judgment and authority of the master after protest, and thus most clearly brings himself within the protection of these principles, and establishes his right of recovery. He could not have safely or lawfully done otherwise than submit under the circumstances; for his disobedience would have been revolt and mutiny, and he would have been liable to personal hazard and punishment; and to hold, under such circumstances, that he cannot recover for his own personal injuries, received without any fault of his own, and solely by the careless and unreasonable orders of his superior, would be outrageously unjust."

Again, at page 608:

> "The seaman on the voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful author-

ity demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury."

To the same effect also is the English case of *Yarmouth* v. *France,* 192 B. D., 647, holding that from the fact that a workman drove a horse known to be vicious, after protesting to the foreman that the horse was unfit, it could not be said as matter of law that the workman had voluntarily assumed the risk of injury.

IV.

Does the doctrine of contributory negligence apply to a seaman who is injured on board a vessel while performing a duty by order of and in the manner directed by a first assistant engineer in charge of the vessel and who is authorized to give the order?

A lengthy discussion of this proposition is not deemed necessary, for the reason that the cases cited in the third question would seem to apply.

In *Eldridge* v. *Atlas Steamship Co.,* 134 N. Y., 187, it was held that a seaman could not be considered guilty of contributory negligence as matter of law where the seaman was obeying an order of the master at the time. In laying down this rule the Court considers the circumstances surrounding a seaman and his duty to obey orders, and concludes that even though the command be an unlawful one, the seaman should carry it out and be protected by the law in so doing.

To the same effect also is *Anderson* v. *New York & Cuba Mail S. S. Co.*, 13 N. Y. A. D., 218, and *Keating* v. *Pacific Steam Whaling Co.*, 21 Wash., 415.

At any rate, under the Federal rules the burden of proving contributory negligence is upon the defendant.

Ind. & St. L. R. R. v. *Horst*, 93 U. S., 291.
Hough v. *T. & P. R. R.*, 100 U. S., 213.

V.

Assuming that the rule laid down in the case of *The Osceola* applies to an action brought at common law, does Section 20 of the Seamen's Act create a liability of the employer of the seaman for injuries sustained by him through the negligence of a seaman in command?

The learned Circuit Court of Appeals has held in this case that, regardless of the fellow-servant doctrine, there can be no recovery against the owners of a ship, (or, as in this case, against the charterer) for injuries caused to a seaman by the negligence of a seaman in command. If this be correct, then, of course, the statute, which is the basis of this action and which attempts to abolish the fellow-servant rule in certain cases, is ineffectual to create a liability. But if the reason why recovery in *The Osceola* was denied was the application of the fellow-servant rule, then certainly Section 20, which abolishes this rule in the case of a seaman in command, must leave the way clear for recovery in cases coming within it.

There is no doubt but that the various Circuit Courts of Appeal have differed in their construction of the admiralty rule as laid down in *The Osceola*.

That case states, page 175,

> "that all the members of the crew, except perhaps the master, are as between themselves fellow-servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure."

That paragraph in itself would seem to be sufficient to justify the conclusion that were it not for the fellow-servant rule a recovery would be allowed.

In *The New York*, 204 Fed., 765, the Circuit Court of Appeals for the Second Circuit, in reversing a judgment for damages for injuries received by a seaman, held that as the negligence which caused the accident consisted of the failure of the libelant's superiors to warn him of the dangers of his employment, this negligence was the negligence of a fellow-servant, and hence there could be no recovery.

A similar rule was announced in *The Nyack*, 199 Fed., 383, by the Circuit Court of Appeals for the Seventh Circuit.

In *The Buffalo*, 154 Fed., 815, the Circuit Court of Appeals for the Second Circuit held that the rule laid down in *The Osceola* did not apply to a longshoreman employed by the owner of the ship and working on it. We see no reason why such exception should be made unless the fellow-servant rule be the reason for the *Osceola* decision. A longshoreman not being a member of the crew could not be a fellow-servant with the crew, and therefore their negligence would not be a bar to his recovery.

In *Bettis* v. *Leyland,* 153 Fed., 571 (Circuit Court of Appeals, Fifth Circuit), which was a libel *in personam,* the question in issue was whether or not the owner was liable for injuries sustained by a seaman by reason of the failure of the master or mate to make the surroundings safe. The Court held that as "the premises were only made dangerously unsafe by the negligent handling of the hatch furniture, which was entirely under the control of the libelant and his co-laborers," there could be no recovery.

These cases are in direct conflict with the decision of the Circuit Court of Appeals in the present case, and it seems clear according to their reasoning that if there had been a statute involved similar to the statute under consideration the Courts would in each case have proceeded to determine whether or not the fellow-servant causing the injury was a seaman in command, and if this question had been determined in the affirmative there would necessarily have been a recovery by the libelants.

The decision of the District Court for the Northern District of California in *The Colusa,* 241 Fed., 968, is much more in harmony with the intention of the statute than is the decision in the present case. *The Colusa* does not refer to *The Osceola,* but holds that a boatswain is a seaman in command, within the meaning of the statute, and that the ship is liable for his negligence causing injury to a seaman.

In *Matter of Tonawanda Iron & Steel Co.,* 234 Fed., 198, the District Court for the Western District of New York had occasion to consider the effect of the act concerned in this action. The proceeding there was for limitation of liability, and the particular claim involved was one by a seaman for

personal injuries claimed to have been caused by the improper lighting of the stern deck of the vessel. It was held that the injuries were due to the negligent acts of a fellow-servant, either the master or the mate. The Court then proceeded to a discussion of Section 20 of the Seamen's Act, and would have applied it to the case had it not been that the injuries were received prior to its passage. The Court says, page 201:

> "* * * in the case at bar the Seamen's Act made a substantive change in the maritime law of the land creating a new liability —not simply changing methods of procedure or rules of evidence or affecting the statute of limitation—and making the ship or her owner answerable for the negligence of the officers charged with the responsibility of her navigation, as a result of which a seaman sustains injuries."

Petitioner has not cited any common law decisions to show that the fellow-servant rule is the bar in cases of injuries sustained by seamen, but there are a few authoritative cases which clearly demonstrate the law applicable to this proceeding.

Thus, in *Quebec Steamship Company* v. *Merchant,* 133 U. S., 375, an action had been brought at common law to recover damages for personal injuries. The plaintiff, a woman, was stewardess of a ship. She had signed the shipping articles, participated in salvage, and was in every sense of the term a member of the crew of the ship. She sustained injuries while emptying slop pails over the side of the vessel, when the rod against which she leaned gave way, allowing her to fall overboard. The Supreme Court in reversing the judgment of the lower Court, which awarded her damages on a verdict,

applied common law rules and held that as the accident happened because of the negligence of a fellow-servant, viz.: the carpenter or the porter, she could not recover. The case proceeds solely upon the common law, there being no mention in it of the maritime law or of the admiralty courts, although the action was one which could have been brought in admiralty.

Petitioner does not contend that Section 20 of the Seamen's Act would change the law applicable to the facts of that case, for the fellow-servant there was not a seaman in command. But, according to the reasoning of that case, the fellow-servant rule is the only obstacle to a recovery, and had the injuries been caused by the negligence of a seaman in command, and had there been a remedial statute such as the one involved in this case, recovery would undoubtedly have been allowed.

It is respectfully submitted that the questions involved in this case are of sufficient general material and national importance as to make it desirable that they be passed upon by this Honorable Court, and petitioner therefore prays that the writ of certiorari herein asked for be granted.

FAYETTE B. DOW,
SILAS B. AXTELL,
ARTHUR L. BURCHELL,
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Counsel for Petitioner.

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 657.

PETER CHELENTIS,

Plaintiff-Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Respondent.

BRIEF FOR RESPONDENT, LUCKENBACH STEAMSHIP COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PETER S. CARTER,
WILLIAM H. CARTER,
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Luckenbach Steamship Company, Inc.

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Supreme Court of the United States

OCTOBER TERM, 1917.

PETER CHELENTIS,
Plaintiff-Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Defendant-Respondent.

No. 657.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent, Luckenbach Steamship Company, Inc., opposes the petition for certiorari on the following grounds:

The petitioner brought his action at common law to recover full indemnity, and tried his case on the common law side of the United States District Court, and he is, therefore, subject to and bound by the rules applicable to the trial of common law cases; and the petitioner was bound to prove negligence on the part of the respondent and to show his own freedom from contributory negligence, and that he did not assume the risks of his employment.

At the close of the case in the Trial Court, the learned Trial Judge, on motion of the respondent, dismissed the complaint on the ground there was no proof in the case of any negligence on the part of the owners of the ship (the respondent), and that

the petitioner himself assumed the risk incident to the work; that there was contributory negligence, and there was no evidence in the case of any unseaworthiness, nor was there any claim or evidence for wages or maintenance or cure (Record, fols. 164, 165).

The petitioner waived his rights to wages, maintenance and cure, and stood squarely upon his common law rights, and he cannot now complain because he has been unsuccessful. He had his day in court, the Trial Court directing a verdict in favor of the respondent, and the Circuit Court of Appeals affirmed that verdict, saying:

> "The plaintiff sued for full indemnity, and on the trial declined to make claim for wages to the end of the voyage and expenses of cure and maintenance for a reasonable time thereafter, insisting that by virtue of Sec. 20 of Seamen's Act of March 4, 1915, he was entitled to full indemnity and to go to the jury on the question of the defendant's negligence and of his own contributory negligence."

The petitioner, in his brief (p. 22), under Point "II," raises the question:

> "Does Section 20 of the Seamen's Act (U. S. Comp. St., 1916, Sec. 8337a), which provides that 'in any suit to recover damages for an injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority,' abolish the fellow-servant rule as a defense to an action at common law as between a first assistant engineer in sole command of the engine room of a ship and a seaman subject to and acting under his authority?"

The petitioner makes a misstatement when he says: "a seaman subject to and acting under his

authority." The petitioner was not in the watch of the First Assistant Engineer, Mr. Kayser, when he met with his accident. The petitioner was in the watch of the Second Assistant Engineer, Mr. Snell, who was then "off watch"—Mr. Kayser having taken his place—and the petitioner was also "off watch" at the time he met with his accident.

The Circuit Court of Appeals in its opinion gives a brief outline of what the petitioner was doing before he met with his accident and at the time he received his injuries, how he came to be hoisting the ashes up from the lower hold of the steamer and throw them overboard, and the facts, as set forth by the said Court, are taken from the briefs of counsel and from the record in the case. It is, therefore, unnecessary to restate the case and call the Court's attention to the testimony of the petitioner to show what he was doing previous to and at the time of his accident.

In construing Section 20 of the Seamen's Act the Circuit Court of Appeals has rightly decided that it does not in any way conflict with the decision in the case of *The Osceola*, 189 U. S., 158.

Counsel for the respondent, Luckenbach Steamship Company, Inc., in his brief on appeal to the Circuit Court of Appeals, says:

> "Counsel for defendant" (the respondent) "does not agree with the construction which counsel for plaintiff" (the petitioner) "places on said section. Counsel for defendant maintains said Section 20 was passed to put at rest all uncertainty as to whether the master of the vessel or those as high in command as the master—the engineer—was a fellow-servant with the seamen under him, as that question of law was left open in the case of *The Osceola*, 189 U. S., p. 158, and the case of *The Hamilton*, 207 U. S., p. 406."

Had the petitioner brought suit for wages, maintenance and cure, instead of at common law for full indemnity, he would have been entitled to recover.

The case of *Jensen* v. *Southern Pacific Co.*, cited on pages 12, 13 and 16 of petitioner's brief (reported under the title of *Southern Pacific Co.* v. *Jensen*, 244 U. S., 205), and the case of *Clyde S. S. Co.* v. *Walker*, 244 U. S., 255, have no bearing whatever upon the issues presented by the petitioner in this case. Those decisions were on the question of the constitutionality of the Workmen's Compensation Act, to determine whether or not that act gave the right to longshoremen to recover for injuries sustained on vessels engaged in interstate commerce.

On page 25 of his brief, under Point "III," the petitioner raises the question of whether the doctrine of the assumption of risk applies to a seaman who is injured on board of a vessel while performing a duty.

It applies to the extent that a seaman injured can recover for his wages, maintenance and cure, but not for indemnity. However, where the action is brought at common law and tried on the common law side of the court—as was done by the petitioner in this case—the doctrine of assumption of risk applies to the petitioner.

On page 29 of his brief, under Point "IV," the petitioner raises the question of whether the doctrine of contributory negligence applies to a seaman who is injured on board a vessel while performing a duty.

If the action is brought for maintenance and cure, providing the contributory negligence is not wilful on the part of the seaman, the said doctrine of contributory negligence does not apply, and the seaman can recover.

In this case, however, the petitioner brought his action at common law, and it was tried on the common law side of the court; and the petitioner is, therefore, subject to the rule of law of contributory negligence, defeating his right to recover, as it was shown by the record, and so found by the learned Trial Judge at the close of the case in the lower court, that he contributed to his own injury.

It is respectfully submitted that said Section 20 of the Seamen's Act has been properly construed by the learned Trial Judge, and said construction has been affirmed by the Circuit Court of Appeals.

Wherefore, the respondent, Luckenbach Steamship Company, Inc., prays that the petition herein be denied.

Dated, New York City, October 4, 1917.

Respectfully submitted,

PETER S. CARTER,
WILLIAM H. CARTER,
Counsel for Respondent,
Luckenbach Steamship Company, Inc.

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CLERK.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 657.

PETER CHELENTIS, PETITIONER,

vs.

LUCKENBACH STEAMSHIP COMPANY, INC.

BRIEF FOR PETITIONER.

SILAS B. AXTELL,
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The Hecla Press, 57 Warren St., N. Y. Tel. 6290 Barclay.

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Supreme Court of the United States

PETER CHELENTIS,
Petitioner,

against

LUCKENBACH STEAMSHIP CO., LTD.,
Respondent.

The above case comes to this Court upon a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, petition for certiorari having been filed August 31st, 1917, and the writ of certiorari and return filed November 10th, 1917.

Facts.

The facts in the case are as follows: On December 26th, 1915, Peter Chelentis, the petitioner, was a fireman employed by the respondent on board the *J. L. Luckenbach,* a steamship chartered by it, engaged in trade between New York and other ports (R., fol. 25). The ship flew the American flag, and was registered at the port of New York (R., fol. 26). It was conceded that petitioner was employed by respondent, as were all the persons on board the ship.

The seamen were organized in watches, and one of the officers or engineers was in charge of each

watch (R., fol. 48). Petitioner was in the engineer's watch from 12 o'clock midnight of December 25th to 4 o'clock in the morning of December 26th, under one Mr. Snell, the second assistant engineer (R., fols. 27-28). It had been the custom on this vessel for firemen to stay over after the expiration of the watch in which they were engaged to dump the ashes which had accrued during the watch, thus becoming subject to the orders of the person in charge of the next watch (R., fols. 28, 34). On the morning in question (December 26th, 1915) petitioner, having been relieved at 4 o'clock, remained over until about 4.30 for this purpose (R., fols. 27-28). The watch from 4 o'clock to 8 o'clock was in charge of one Mr. Kayser, the first assistant engineer.

It appeared from the testimony that the method of dumping ashes was to hoist them up in bags by means of a winch from the bottom of the fireroom to the top of the fireroom, and so on to the deck. The gratings or portion of the fireroom on a level with the deck were covered with a superstructure or house, on each side of which was a door. The winch was situated on the port side of the house, and it was customary to dump ashes there, for the reason that but two men were necessary if the work were done that way (R., fols. 40-41). In order to dump ashes on the starboard side it was necessary to have three men—one to hoist the ashes, another to lift and hand them over a cross-bunker in the middle of the house, and a third to receive them on the other side, carry them across the deck and dump them overboard (R., fol. 29).

When petitioner came on deck for the purpose of dumping the ashes he found a heavy sea running on the port side of the ship. There was a strong wind blowing and the waves were breaking over the deck

(R., fols. 27, 40-41). Observing the danger of attempting to work on the port side of the vessel under such conditions, he asked Kayser, the first assistant engineer, who was in charge at that time, for another man, so that they might dump the ashes on the starboard side. Kayser refused this aid, and expressly directed the petitioner to go on with the dumping of the ashes in the regular way (R., fols. 28 and 39). This engineer, in declining to give the aid, insisted that the ashes be dumped, and pushed Chelentis and his mate out onto the deck (R., fols. 29, 40 to 41). Upon receiving this order, petitioner and his mate, without further protest, proceeded to dump the ashes. His mate raised the bag of ashes by means of the winch, and petitioner, receiving it at the port door of the superstructure, proceeded to carry it across the deck, dumped the ashes and attempted to return. On his way back a large wave broke over the port side of the vessel and, overtaking him, knocked him down and carried him to the rear of the superstructure and clear to the other side of the vessel, throwing him under some pipes and breaking his leg in three places (R., fol. 29, and testimony of Nicholas, fol. 39). Petitioner was then treated by the officers of the vessel, and when the vessel reached New York, on the following day, he was taken to the Marine Hospital, where he remained two or three months. During the time he was there it became necessary to amputate his leg at a point six inches above the knee. It was conceded that petitioner was injured to the extent claimed, and that the amputation of the leg was necessary as a result of the accident (R., fol. 38).

The same facts appear in the testimony of one Nicholas, petitioner's mate, who aided him in the work (fol. 39).

The present action was originally brought in the Supreme Court of the State of New York, triable in the County of New York, and was removed to the United States District Court for the Southern District of New York upon the ground of diversity of citizenship, the defendant being a Delaware corporation. There was also joined as defendant, Luckenbach Company, Inc., the owner of the vessel, but plaintiff discontinued as to it upon counsel's concession that Luckenbach Steamship Company, Inc., the respondent herein, operated and controlled the vessel at the time of the injury, and employed everyone on board, including the plaintiff (R., fol. 25).

The pleadings will be found at pages 2 to 11 of the record.

The complaint demands judgment in the sum of $50,000 for plaintiff's injuries.

At the close of plaintiff's case defendant moved to dismiss the complaint upon the ground that the sole liability of the defendant for petitioner's injuries was the expense of his maintenance and cure, and upon the ground that there was no negligence shown on the part of the defendant; that the evidence showed contributory negligence on the part of the plaintiff, and that he assumed the risk of injury—this to be inferred from the fact of his having asked for a third man in order that the ashes might be dumped on the starboard side of the ship. The plaintiff opposed this motion upon the ground that a negligent order was given, and plaintiff, being subject to the authority of Kayser, was bound to obey it, and moved that the case be allowed to go to the jury. The Court granted the motion of defendant's counsel and directed a verdict for the defendant (R., fols. 52, 53, 54, 55). Plaintiff excepted to the direction of the verdict, moved to set the verdict

aside, and moved that the case be sent to the jury upon the facts. The motion was denied, and exception was taken. Judgment was entered upon the verdict so directed in favor of the respondent and against petitioner for costs.

On December 15th, 1916, a writ of error was duly allowed, and the case came on regularly to be heard before the United States Circuit Court of Appeals for the Second Circuit. In March, 1917, the appeal was argued before Judges Ward, Rogers and Hough, and thereafter the Circuit Court of Appeals rendered and filed an opinion and decision written by Judge Ward, which, among other things, held that petitioner was bound by the rules of the admiralty law and not by the common law, for the reason that his contract, being maritime, was the same in every court and had written into it those peculiar features of the maritime law which were considered in the case of *The Osceola,* 189 U. S., 158; that under the rule laid down in that case there could be no recovery by a seaman for injuries received through the negligent order of a person in command, and this regardless of whether or not the person giving the command be a fellow-servant. The Court further held that the statute of the United States known as Section 20 of the Seamen's Act of March 4th, 1915 (Section 8337a United States Compiled Statutes, 1916), did not change this rule, for the reason that the obstacle which Congress thereby attempted to remove was the fellow-servant rule, and as that rule was not a bar, the act referred to could not change the law.

The opinion of Judge Ward appears at page 38 of the record.

The act reads as follows:

> "In any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority."

In the application for the writ of certiorari heretofore presented to this Court the questions and propositions of law involved in the case were set forth as follows:

1. Are the rights of a seaman, suing at common law, for damages for personal injuries, claimed to have been caused by the negligence of the ship owner, limited by the admiralty rule allowing a recovery of the expenses of maintenance and cure only, or may he recover full indemnity?

2. Does Section 20 of the Seamen's Act (U. S. Compiled Stat., 1916, Sec. 8337a), which provides that "in any suit to recover damages for an injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority," abolish the fellow-servant rule as a defense to an action at common law, as between a first assistant engineer in sole command of the engine room of a ship and a seaman subject to and acting under his authority?

3. Do the doctrines of assumption of risk and contributory negligence bar recovery in an action at common law by a seaman employed as fireman who is injured on board a vessel while performing a duty by order of and in the manner directed by a first assistant engineer in charge of the engine room of the vessel and who is authorized to give this order in the course of his duty?

4. Assuming that the rule laid down in the case of *The Osceola* (*supra*) applies to an action at common law, does Section 20 of the Seamen's Act create a liability of the employer of the seaman for injuries to the seaman caused solely by the negligence of a seaman in command?

The brief which follows is divided into two parts. In the first part it is argued that, regardless of what the rule may be in admiralty, the present action, being an action at common law, should be governed by the rules of the common law, rather than by the rules of admiralty, and that Section 20 of the Seamen's Act removes the fellow-servant rule in the case at bar. In the second part of the brief it is argued that the obstacle to recovery, even in cases of admiralty, is the fellow-servant rule, and that that rule has been removed by the same statute.

PART I.

Liability for petitioner's injuries should be governed by the common law, rather than by the admiralty law.

In discussing this point, it first becomes necessary to consider the jurisdiction of the common law over cases which are within the admiralty jurisdiction. To question the application of the common law to navigable waters is a startling proposition. No decision of this Court can be cited which has denied the application of the common law in a proceeding to invoke that rule of law, just because the tort or contract occurred upon or related to navigable waters. All decisions concede to the common law courts the right to apply their own remedies in accordance with the provisions of the saving

clause in the ninth section of the Judiciary Act of 1789 (Sections 563 and 711, Revised Statutes of the United States, 1901; Sections 24 and 256, Judicial Code of 1911). As concurrent remedies existed at common law and under the maritime law in such cases, a suitor always enjoyed the right to determine which remedy should be pursued.

In *Leon* v. *Galceran*, 11 Wall., 185 (1870), a suit was brought *in personam* by Galceran and two other sailors in the state courts of Louisiana against the owners of a certain schooner to recover mariner's wages. It was conceded that the contract of the sailors was a maritime contract. This Court held that the state courts had jurisdiction, and that the action was maintainable at common law. In holding that the Judiciary Act saved to these sailors their common law remedy the Court, on page 188, said:

> "He may have an action at law in the case supposed either in the Circuit Court or in a State Court, because the common law, in such a case, is competent to give him a remedy, and wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the judiciary art."

In *Schoonmaker* v. *Gilmore*, 102 U. S., 118 (1880), an action was brought in the courts of Pennsylvania against the owners of a steamtug for negligence of such owners in colliding with and damaging certain barges belonging to the plaintiff. The collision and damage occurred in the Ohio River a few miles below Pittsburgh. The point was made by defendants that the courts of the

United States had exclusive jurisdiction in all cases of collision on navigable waters, but this Court held that the Pennsylvania courts had jurisdiction, and affirmed their judgment. On page 119 it is said:

> "The single question in this case is, whether the courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River. This is a Federal question, and gives us jurisdiction; but we cannot consider it as any longer open to argument, as it was decided substantially in *The Moses Taylor*, 4 Wall., 411; *The Hine* v. *Trevor*, *id.*, 555; *The Belfast*, 7 *id.*, 624; *Leon* v. *Galceran*, 11 *id.*, 185; and *Steamboat Company* v. *Chase*, 16 *id.*, 522. The Judiciary Act of 1789 (1 Stat., 73, sect. 9), reproduced in sect. 563, Rev. Stat., par. 8, which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea cannot be denied."

In *Chappell* v. *Bradshaw*, 128 U. S., 132 (1888), an action was brought in the courts of Maryland for damages by fire caused by the negligence of the defendant's servants in cutting a burning scow or lighter loose from defendant's wharf and allowing it to drift against the plaintiff's vessel. In sustaining the jurisdiction of the state court it is said, on page 134:

> "* * * it is sufficient to say that, as the action as brought and defended was a common law action without any of the ingredients of an admiralty or maritime cause, it was, as such, clearly within the provision of

> the ninth section of the Judiciary Act of 1789, as embodied in Section 563 of the Revised Statutes, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it'."

In *Knapp* v. *McCaffrey*, 177 U. S., 638 (1899), a bill in equity was filed in the courts of Illinois to enforce a lien for the towage of a certain raft from a point in Minnesota to St. Louis. This Court held that the remedy chosen by the plaintiff was the detention of the raft for his towage charges, and that such remedy was a common law remedy within the meaning of Section 563 of the Revised Statutes. This Court, on page 644, after citing many common law remedies which exist independent of an action, said:

> "In the case under consideration the remedy chosen by the plaintiff was the detention of the raft for his towage charges. That a carrier has a lien for his charges upon the thing carried, and may retain possession of such thing until such charges are paid, is too clear for argument."

Furthermore, the Court held that although the bill in equity was not a common law action, yet it was an action to enforce a common law remedy, and, therefore, within the provisions of the saving clause.

In view of the unbroken line of decisions of this Court sustaining the application of the common law to navigable waters, it becomes unnecessary to refer to the many decisions of the state courts which have exercised this right from time immemorial. One decision involving the precise question in this case may suffice.

In *Kallock* v. *Deering*, 161 Mass., 469 (1894), an action was brought by a seaman against the owners

of a vessel for personal injuries occasioned while on board the vessel in harbor through the breaking of a triangle upon which the plaintiff was sitting and scraping a mast. The case was tried in accordance with the common law and a judgment below for the plaintiff was reversed on the ground that the negligence was that of a fellow servant, and, therefore, under the common law the plaintiff could not recover. On page 469 the Court, by Mr. Justice Holmes, said:

> "This is an action of tort for personal injuries suffered on board a coasting vessel while in harbor, through the breaking of a triangle on which the plaintiff was sitting and scraping a mast. As the case comes before us we must take it that the defendants did their duty in furnishing the materials for the construction of the triangle, that the mate was in control of the vessel, at the time, and that the cause of the plaintiff's injury was some negligence on the mate's part in constructing the triangle and in ordering the plaintiff to use it. The question is whether the defendants are answerable for this conduct of the mate.
>
> By the common law as understood in this state, the work of construction was not one of the matters which the defendants were bound at their peril to see done with reasonable care, and therefore if those engaged upon it were fellow servants in their general standing and occupation, the plaintiff took the risk of their negligence. They were not removed from the class of fellow-servants for the time being by the nature of their occupation, to adopt the mode of expression which has been used."

The Court then cites Massachusetts cases in support of its opinion, and then discusses the question

whether the mate was at the time discharging one of the personal duties of the owners and was for the time being a vice-principal. The Court held that although the mate ordered the plaintiff to work on a defective triangle, yet such command is the act of a fellow-servant, and in accordance with *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S., 368, and other cases, the defendants were not liable, saying, on page 471:

> "These considerations apply, and have been applied by common law courts, to the captain of a vessel, and it has been said that he is a fellow servant within the meaning of the rule. *Hedley* v. *Pinkney & Sons Steamship Co.*, 1 Q. B., 58 (1892); *Loughlin* v. *State*, 105 N. Y., 159. So in this Commonwealth as to a mate, *Benson* v. *Goodwin*, 137 Mass., 247.
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> But it is argued that a different doctrine obtains in the admiralty and that we ought to follow the law which would be administered by the courts especially constituted for the affairs of seamen. For this argument it does not matter precisely where the vessel was. If the accident happened within the body of the county, the admiralty jurisdiction would not be excluded. *Waring* v. *Clarke*, 5 How., 441; *The Commerce*, 1 Black, 574; and if upon the high seas, that of the common law is not to be denied. *Percival* v. *Hickel*, 8 Johns., 257; *Wilson* v. *McKenzie*, 7 Hill (N. Y.), 95, 97."

The Court then cites various admiralty cases which follow the rule laid down in *Railroad* v. *Ross*, 112 U. S., 377, and, in commenting, it is said, on page 471:

> "If the American cases meant that admiralty courts had worked out the liability of the ship for the acts of the captain, from

their own peculiar principles, it might be necessary to inquire whether the personal liability of the owner necessarily followed from the same premises, and if it did, why the common law should yield to the admiralty, rather than the admiralty to the common law. But it hardly is to be expected that different views of the substantive law should be enforced by the same judges sitting in different courts. In *The A. Heaton,* 43 Fed., 592, Mr. Justice Gray did not declare a doctrine peculiar to the admiralty; he merely deferred to a decision upon the common law from which he himself had dissented, which is inconsistent with the cases in this Commonwealth and which has been explained by a later decision of the court which rendered it. *Chicago, Milwaukee & St. Paul Ry.* v. *Ross,* 112 U. S., 377; see *Baltimore & Ohio Railroad* v. *Baugh,* 149 U. S., 368.

Under these circumstances the circuit court cases do not seem to us a sufficient reason for departing from the common law because the accident happened on board ship. Moreover it is very plain that we cannot adopt the admiralty law as a whole. We can not divide the damages when the plaintiff has been guilty of contributory negligence, as was done in *The Julia Fowler,* 49 Fed., 277. *The Max Morris,* 137 U. S., 1. See *Dowell* v. *General Steam Navigation Co.,* 5 El. & Bl., 195, 206."

The concurrent jurisdiction of both systems of law arises from the saving clause contained in the Judiciary Act, and it has been held many times that the only remedy which the common law is not competent to give under that section is the right to an action *in rem* in a maritime matter. Of those cases the admiralty courts have unquestioned and exclusive jurisdiction.

McDonald v. *Mallory*, 77 N. Y., 546.
The Hamilton, 207 U. S., 398.
Rounds v. *Cloverport Foundry*, 237 U. S., 301.
The Hine v. *Trevor*, 4 Wall., 555.

Congress in saving the common law intended to save the common law of the states, there being no United States common law.

Wheaton v. *Peters*, 8 Pet., 591-657.
Western Union Tel. Co. v. *Call Pub. Co.*, 181 U. S., 92-101.

This intention was crystallized by Sec. 721 U. S. Compiled Stat. (1901), which provides that:

> "The laws of the several states except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply."

That there is a difference between the underlying principles of the systems of common law and admiralty is clear from many decisions. If there were no difference, it would be difficult to understand what purpose Congress had in mind in saving the common law remedy. At any rate, Congress intended to supplement the very limited law of the sea by saving rights at common law.

Probably the more concise definition of what was saved is found in *The Moses Taylor*, 4 Wall., 411, where it was said by Mr. Justice Field:

> "It is not a remedy in the common law courts which is saved, but a common law remedy."

We believe he meant that any remedy which the common law afforded would be open to suitors under the saving clause, and that the test of whether or not a given remedy is a common law remedy must be its nature and underlying principles, rather than the place of its enforcement. The Court held in that case that an act of California which allowed actions directly against a ship in certain instances was not a valid enactment, for the reason that it was not a remedy known to the common law, and that the fact of its being enforced by a common law court could not make it a common law remedy. (This principle has been modified since that time by the cases involving death statutes.)

In *Waring* v. *Clark*, 5 Howard, 441, the Court, Wayne, *J.*, says, at pages 460-461:

> "In respect to the clause in the ninth section of the Judiciary Act—'saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it'—we remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant—when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for plaintiff, which would be the case if he could at his will force the plaintiff into a common law court and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both, as a security and indemnity for injuries of which a libellant may complain—

> securities which a court of common law cannot give."

So, in the case at bar, assuming that the admiralty law limits the petitioner to the expenses of his maintenance and cure (a grossly inadequate remedy for the severe injuries sustained), if the common law affords a remedy, our position is that petitioner is entitled to the benefit of it.

In *American Steamboat Co.* v. *Chase*, 16 Wall., 522, at page 530, Justice Clifford said:

> "Where no remedy exists for an injury in the admiralty courts, the fact that such courts exist and exercise jurisdiction in other causes of action leave the state courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the constitution and had no existence in our jurisprudence."

Again, he says, at page 532:

> "Sufficient has already been remarked to show that the state courts have jurisdiction if the admiralty courts have no jurisdiction, and a few observations will serve to show that the jurisdiction of the state courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of the topic cannot be necessary, as several decisions of this court have established that rule as applicable in all cases where the action in the state court is in form a common law action against the person, without any of the ingredients of a proceeding *in rem* to enforce a maritime lien. Where the suit is *in rem* against the thing, the original jurisdiction is exclusive in the district courts, as pro-

vided in the 9th section of the judiciary act; but when the suit is *in personam* against the owner, the party seeking redress may proceed by libel in the district court, or he may, at his election, proceed in an action at law, either in the circuit court, if he and the defendant are citizens of different states, or in a state court as in other cases of actions cognizable in the state and federal courts exercising jurisdiction in common law cases, as provided in the 11th section of the judiciary act. *Leon* v. *Galceran*, 11 Wall., 188."

And at page 534:

"Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he must conform to the system of pleading and to the rules of practice, and of evidence which prevail in the chosen forum. State statutes if applicable to the case, constitute the rules of decision in common law actions, in the Circuit courts as well as in the State courts, but the rules of pleading, practice and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court. State legislatures may regulate the practice, proceedings and rules of evidence in their own courts, and those rules, under the 34th section of the judiciary act, become in suits at common law, the rules of decision where they apply, in the Circuit Courts."

And as petitioner had the choice of two courts in which to bring his action, if it had developed that the court which he chose had an unfavorable rule he would have been bound by it, and could not have asked that the rule of the other court be ap-

plied. Admiralty courts administer the admiralty law,—common law courts, the common law,—and the principles of equity, rather than the strict rules of common law are the controlling principles upon which courts of admiralty act.

Atlee v. *Packet Co.*, 21 Wall., 389, was a libel in admiralty to recover damage sustained by libelant's scow in colliding with a stone pier built in the navigable waters of the Mississippi River. It was contended by the claimant that he had a right at common law, being the owner of the land and the riparian rights, to build his pier as he saw fit, and that he was not liable for damages to persons who were injured thereby. But this Court held that the admiralty law applied to the matters in dispute, the action having been brought in an admiralty court.

Mr. Justice Miller, at page 395, says:

> "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case notwithstanding the concurrent right to sue at law. In this court, the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common law court the defendant must pay all the damages or none. If there has been on the part of the plaintiff such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the Admiralty Court, where there has been such contributory negligence, or in other words, when both have been in fault,

> the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum."

Applying this reasoning, the Court there proceeded to administer the admiralty rules and decreed to the libelant one-half of his damage.

In *Waring* v. *Clarke*, 5 How., 441, Mr. Justice Wayne, speaking for the Court, in holding that the provision securing the right to a jury trial in "suits at common law" does not apply to "suits in admiralty," said:

> "Suits at common law are a distinct class, so recognized in the constitution, whether they be such as are concurrent with suits of which there is jurisdiction in admiralty or not. Can concurrent jurisdiction imply exclusion of jurisdiction from tribunals, in cases admitted to have been cases in admiralty, without trial by jury? Again, suits at common law indicate a class, to distinguish them from suits in equity and admiralty; cases in admiralty another class distinguishable from both, *as well as to the systems of laws, determining them as to the manner of trial*, except that in equity, issues of fact may be sent to the common law courts for a trial by jury."

The question of the applicability of the common law to cases within the admiralty jurisdiction was raised in two cases recently disposed of by this Court.

In *Southern Pacific R. R. Co.* v. *Jensen*, 244 U. S., 205, it would be difficult to add to the exhaustive opinion of the dissenting justices on the point of the distinction between the two systems of law, but the majority of the court, without attempting to deny the distinction, held that the remedy which was saved by the Judiciary Act did not include a remedy which was neither a part of the common law nor an amendment to it; that the New York Compensation Act was not the common law, but was something wholly unknown to any system of law until its inauguration by the statute. As was said in the prevailing opinion, page 218:

> "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

The statute was an experiment in legislation as regards maritime matters, which its authors thought might be maintained by extending the rule laid down in *The Hamilton* (207 U. S., 398).

Since the *Jensen* decision Congress has amended the saving clause so as to include rights under the Compensation Acts of the various states.

In *Schwede* v. *Zenith S. S. Co.*, 244 U. S., 646, which was disposed of with the *Jensen* case by an equally divided court, and affirmed, the validity of an Employers' Liability Act was involved. As there was no opinion delivered by this Court, and as we do not believe it intended to affirm on the opinion of the District Court, we must assume that the Court considered the Employers' Liability Act there involved to be subject to the same objection as the compensation statute which was involved in the *Jen-*

sen case. (This case will be more fully considered under a subsequent point; see p. 31.)

We submit that these cases show clearly that there are two jurisdictions, each independent of the other and each working out its own body of law according to its own ideas. A few illustrations will serve to show the application of different law upon the same facts in these two courts.

At common law the general rule of almost universal application is that there can be no contribution between joint tort feasors. In admiralty the rule is settled the other way, and contribution is allowed. *Erie R. R. Co.* v. *Erie Transportation Co.*, 204 U. S., 220, holding that the admiralty courts are free to work out their own system of law, and are not restricted by the doctrines of the common law courts.

And this is logical, for jurisdiction in its true sense cannot be said to exist unless the Court is empowered to apply its own rule of conduct. Why should a common law court look to the admiralty law for a rule of decision when the common law furnishes a rule?

In *Belden* v. *Chase*, 150 U. S., 674, there had been a collision between two ships on the Hudson River, and the owner of the *Vanderbilt* chose to sue the owner of the *Yosemite* in the Supreme Court of New York rather than in the admiralty courts.

The Court, speaking through Mr. Chief Justice Fuller, says, at page 691:

> "The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision, has long prevailed in England and this country. *The*

Max Morris, 137 U. S., 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee* v. *Packet Co.,* 21 Wall., 389.

In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or in other words, he could not recover though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

In *Workman* v. *New York City,* 179 U. S., 552, an admiralty case, the admiralty law was applied, although it was conceded that the common law was different.

The fireboat *New Yorker,* proceeding to a fire, collided with libelant's boat, and libelant filed a libel *in personam* to recover the damage. It was objected that by the common law, a municipal corporation could not be held liable for the acts of its servants while engaged in a public service. This Court held that as the admiralty courts had jurisdiction it was their duty to apply the admiralty law; that by the general principles of that law a ship in colliding with another is liable to a lien, and the ship is treated as the offending thing, regardless of the nature of the work being performed at the time. It being considered that principles of public policy would forbid the filing of a libel *in rem* against a vessel engaged in such a service, the admiralty courts would, nevertheless, apply appropriate relief under a libel *in personam.*

Two cases in this Court will by contrast illustrate the application of different law on practically the same facts.

In *The China,* 7 Wall., 53, a libel *in rem* was filed for damages caused by *The China* in colliding with another vessel. *The China* had on board at the time a licensed pilot, which she was compelled to engage under the laws of the State of New York. It was urged on behalf of her owner that the pilot was not a servant of the ship and the ship was not liable for his negligence. It was held that under the admiralty law a ship in causing a collision is regarded as the offending thing and becomes liable to a lien, regardless of the relation of the person in command; that this rule is not based upon any common law principle, and, therefore, the fact that the relation of master and servant did not exist between owner and pilot had no bearing upon the question.

At a much later date the case of *Homer Ramsdell Transportation Company* v. *La Compagnie Generale Transatlantique,* 182 U. S., 406, came before the Court. This was an action at common law to recover damages for injuries to a pier caused by defendant's ship colliding with it. The ship was at the time under the control of a licensed pilot, whom the owner was compelled to engage under the same law involved in the preceding case. It was held that if there was to be any recovery it must be based upon the common law rule of *respondeat superior;* that this rule could not apply here, for the reason that the relation of master and servant did not exist between the owner of the ship and the pilot, and, therefore, there could be no recovery.

The Court, at page 413, refers to another case (*Ralli* v. *Troop,* 157 U. S., 386), and quotes approv-

ingly the language of the dissenting justices therein, explaining the decision in *The China:*

> "This Court held contrary to the English, but conformably to the continental authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, *although it was admitted that if the action had been at common law against the owner, and probably also in personam in admiralty, there could have been no recovery as a compulsory pilot is in no sense the agent or servant of the owner.*"

Probably the two cases which throw most light on the present subject are *Quebec S. S. Co.* v. *Merchant*, 133 U. S., 375 (1890), and *The Osceola*, 189 U. S., 158 (1903).

The first of these cases was an action at common law to recover damages for injuries alleged to have been received through defendant's negligence. The plaintiff was a woman and stewardess of a ship. She was in every sense of the term a member of the crew, as she had signed the shipping articles, and had even participated in salvage given to the vessel. While engaged in the performance of her duties she leaned against a railing or rod on deck, which gave way, and she fell overboard and was very seriously injured. This Court held that the negligence, if any, was that of the carpenter or porter in not making the rods secure, and for that negligence, being the act of a fellow-servant, the owner was not responsible.

That case was argued for plaintiff-in-error in this Court by counsel learned in the admiralty law, Mr. William Allen Butler, and there is not in his brief as reported even a passing mention of any peculiar rule of the admiralty law. The Court does not refer

to the admiralty law, and the case turns upon a simple common law principle, the fellow-servant rule.

Thirteen years later the case of *The Osceola* came before this Court. A libel *in rem* had been filed to recover damages sustained by a seaman in the course of his duty. He had attempted to carry out an order to hoist a gangway while the vessel was under sail, and was seriously injured in the attempt.

In the briefs filed in this Court copious references to admiralty cases were made. The principles of admiralty were undoubtedly fully discussed. Very few references to the common law were made, except to show that it was not binding on the admiralty courts. This Court held the vessel not liable *in rem* for the injury, *for the reason that the maritime law did not allow it.* It was argued in appellant's brief that as the appellee had resorted to a libel *in rem* the Court was bound by the maritime law, and, further, that cases holding the owner liable *in personam* were rested on the common law.

Mr. Justice Brown said enough at the beginning of the opinion to warn against taking this opinion as a precedent in an action at common law; page 168:

> "As this is a libel *in rem*, it is unnecessary to determine whether the owners would be liable to an action *in personam*, either in admiralty or at common law, although cases upon this subject are not wholly irrelevant.
>
> If the rulings of the district court were correct, that the vessel was liable *in rem* for these injuries, such liability must be founded either upon the general admiralty law or upon a local statute of the state within which the accident occurred. As the admiralty law

> upon the subject must be gathered from the accepted practise of courts of admiralty, both at home and abroad, we are bound in answering this question to examine the sources of this law and its administration in the courts of civilized countries, and to apply it, so far as it is consonant with our own usages and principles, or, as Mr. Justice Bradley observed in *The Lottawanna*, 21 Wall., 558, 'having regard to our own legal history, constitution, legislation, usages and adjudications'."

This is the case which the learned Circuit Court held furnished the rule by which petitioner's rights at common law must be adjudged. Assuming, for the purpose of this point, that the interpretation of the rule of liability therein contained by the Circuit Court is correct, we maintain that this case has no application to the present case, for the reason that the rule there laid down applied only to the question of maritime lien enforcible under the admiralty law, and not to the liability of the owner in an action at common law.

It will be noted that in England the courts of common law apply common law principles (*Hedley* v. *Pinkney*, 1894, A. C., 222); also in Ireland (*Ramsay* v. *Quinn*, Ir. Rep., 8 C. L., 322) and in Scotland (*Leddy* v. *Gibson*, 11 Ct. Sess. Cas., 3d Series, 304).

The Reason for a Different Rule in Cases Where the Action is in Personam.

The reason for a different rule in an action *in personam* from that which is applied in an action *in rem* is not altogether clear. But the learned Circuit Court of Appeals considered the rule to be dif-

ferent, and upon consideration a reason can be suggested. If the action be *in rem*, it means that the lien which is the basis of the action follows the ship into the hands of an innocent purchaser. As is shown by *The China* and *Workman* v. *New York City* and by *The Osceola, supra*, the admiralty law holds the ship liable *in rem* where the *ship herself* has done some damage. This damage may be done by colliding with another ship, as in *The China*, or, if the ship be improperly fitted, the injury to a seaman resulting therefrom may well be said to be done *by the ship*. This is a departure from the early cases, but, as the Court held in *The Osceola*, it is an advance and should not be cast aside. It was to this strict rule that libelant in *The Osceola* was held, and because the ship herself had not done the injury there was no maritime lien. The policy of the maritime law was to hold a ship where the ship was in fault. If a person in purchasing a ship find that the ship is imperfectly equipped, he has notice that conditions are such as to create a lien if any seaman has been injured. If he finds the ship to be perfect in every particular, then he knows that there can be no lien for a greater amount than maintenance and cure.

This rule—if there be such a rule—does not have to be disturbed—the present case calls, not for an extension of the admiralty rule, but for a determination of the liability of the owner at common law—a liability which does not follow the ship and does not, therefore, interfere with navigation.

The Liability of the Master to the Servant is a Liability Imposed by Law and is not a Matter of Contract.

In the opinion of the Circuit Court in the case at bar it was held that there could be no recovery under the maritime law for plaintiff's injuries, and that by his contract of employment he had agreed to be bound by that law.

The Court said (R., p. 40):

> **"The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola, supra,* and although because of these pecularities such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by *lex fori.* If a seaman who had been locked up or put in irons for disobedience of orders were to sue the master for damages in a court of common law he could not recover like a shore servant such as a cook or chauffeur who had received the same treatment. *So a seaman bringing suit in a common law court for personal injuries could recover even if guilty of contributory negligence, although a shore servant suing in the same court could not.* And a seaman suing in a common law court for personal injuries could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's con-**

> tract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case, the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter."

This follows the holding of the District Court in *Schwede* v. *Zenith S. S. Co.*, 216 Fed., 566, above referred to.

We believe that the learned Court has misinterpreted the law.

The Court says that "a seaman bringing suit in a common law court for personal injuries could recover even if guilty of contributory negligence, although a shore servant suing in the same court could not."

This statement is unsupported by authority—it is contrary to the reported decisions, and although it is not material in the present case it indicates the stand taken by the Court in the application of the admiralty law and the importance of the point of whether or not a maritime contract may control the rights of the parties in a tort action.

If the contract contained an express stipulation to the effect that one of these systems should apply to the exclusion of the other, in other words, exempting the owner from the consequences of his negligence, its validity might well be challenged. How, then, can an implied stipulation accomplish that which cannot be done by express contract?

Petitioner's contract of employment is not in evidence. It is in the regular form of shipping articles and, of course, says nothing about what law is to govern the rights of the parties under it. The mere

fact, however, that the Court refers to such an implied stipulation concedes the existence of two different systems of law which might be applied. Now, there are probably numbers of cases where the common law will differ from the admiralty law on a given state of facts. If the mere fact that a contract between the parties be maritime require the application of the admiralty law, then many suits between persons other than seamen and owners will have to be determined by the admiralty law to the exclusion of the common law. To illustrate, a contract to tow a boat is a maritime contract (*The John G. Stevens*, 170 U. S., 113), and even a contract to tow a raft (*Knapp* v. *McCaffrey*, 177 U. S., 638); also a contract for passage on a liner, a contract of affreightment, or a charter-party, and innumerable others. Very often in the performance of these contracts torts will be committed. If the rule which has been laid down in this case be allowed to prevail, then in every instance of a tort arising during the continuance of such a contract the rules of the admiralty courts will furnish the exclusive remedy.

We submit that this is not the law. Our proposition is that the obligation of the parties to each other for wrongs occurring during the existence of a contract is not determined by the contract, but is fixed by law, and the contract is shown as any other fact in the case, to show the relation existing between the parties. In case of injury to a servant the resulting action is not for breach of contract; it is an action to recover damages fixed by law for the commission of a tort.

And in order to determine the appropriate law it is necessary to determine what law is in force at the place the accident occurred.

Martin v. *Pittsburgh Ry. Co.*, 203 U. S., 284.

In the cited case it was held that the right of recovery of a railway mail clerk who was engaged in Ohio and injured in Pennsylvania was governed by the law of the place of injury. No question of contract rights is involved.

With regard to the decision of the District Court in the *Schwede* case, *supra*, and that of the Circuit Court in the case at bar, holding that the fact of the contract being maritime requires the application of the maritime law, we believe the trend of the decisions is the other way. The holding of Judge Killets in the *Schwede* case has been criticized severely and dissented from in two instances.

In *Keithley* v. *Northern Pacific S. S. Co.*, 232 Fed., 255, the District Court of Oregon said, p. 259:

> "Furthermore, this is not an action upon a marine contract, where the law of the sea becomes of the essence of the contract and must be enforced according to that understanding; but it is a tort, and while committed upon water, is subject, nevertheless, to a common law remedy. A tort is without terms or conditions except as the law defines them, and being a creature of the law, the law may also create a remedy; and if the remedy is one at common law, it may be enforced in the State Courts, or in the federal courts where there is diversity of citizenship, although the tort be committed upon navigable waters within the boundaries of the state.
>
> With all due deference to the able and exhaustive opinion of Judge Killets in *Schwede* v. *Zenith S. S. Co.*, 216 Fed., 566, I am unable to agree with his conclusions."

In *Swayne & Hoyt* v. *Barsch*, 226 Fed., 581, the Circuit Court of Appeals for the Ninth Circuit had occasion to review the *Schwede* decision. Of the proposition of maritime contract it says, page 590:

> "We cannot assent to the proposition that the employers liability law of Oregon is rendered inapplicable by the fact that the contract whereby the plaintiff was employed by the defendant was a maritime contract. The plaintiff is not suing upon the contract. He is suing upon the breach of the implied obligation of his employer to use due care."

We submit that the contract fixes only the relation of the parties. The law takes care of the rest.

In *Knapp* v. *McCaffrey*, 177 U. S., 638, a bill in equity was filed to foreclose a common law lien for towage on a raft. The defendant insisted that such an action was not within the meaning of the saving clause, for the reason that it was an action *in rem*. This Court upheld the bill upon the ground that it was filed to protect a right which the common law gave to the complainant—that is, the lien for his services. Now, if contract rights are to govern the remedy, why was not the rule applied in that case? The Court found that the contract to tow a raft was a maritime contract, but, notwithstanding this, it held that as the common law remedy had been saved by the statute, the lienor in this case might employ even an action in equity to enforce his right to a lien which the common law gave him.

This Court has had occasion to pass upon the question of whether or not a tort occurring during the existence of a contract can be said to arise out of the contract.

The John G. Stevens, 170 U. S., 113.

In this case the tug *John G. Stevens*, being subject to a lien for supplies furnished, entered into a contract to tow a schooner, and while engaged in the execution of that contract, negligently caused

the schooner to collide with another vessel, the tug thereby being impressed with a lien in favor of the schooner. The admiralty rule being that a damage lien is superior to prior contract liens, it became necessary to determine whether the lien for collision arose out of the contract of towage, or was an obligation imposed by law for the commission of a tort.

It was unanimously held that the claim was one for tort and did not arise out of contract.

The Court, Gray, *J.*, after referring to a number of decisions, says, page 124:

> "The decisions of this court are in accordance with the latter view, and are inconsistent with any other (the 'latter view' being that the action sounded in tort).
>
> It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for the breach of a duty imposed by law, independently of contract or of consideration and is therefore founded in tort. *P. & R. R. R. Co.* v. *Derby,* 14 How., 468-485; *A. & P. R. R. Co.* v. *Laird,* 164 U. S., 393."

The same rule was laid down in *The Quickstep,* 9 Wall., 665, where, in an action by the owners of a tow against the tug for collision, Davis, *J.*, said, page 670:

> "The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way

> of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the *Quickstep.*"

Courts have often mentioned the "implied contract" between the master and servant in personal injury cases, but that statement is nothing more than a "juristic fiction" used for the purpose of explaining a settled rule of law.

In *Farwell* v. *Boston & Worcester Ry. Co.*, 4 Metcalf, 49, the leading case in this country on the fellow-servant rule, Chief Justice Shaw makes clear the point that the exemption of the master from liability for the acts of a fellow-servant is based, *not upon a contract,* but upon a rule of law. He says, at page 58:

> "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. *This is in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all parties concerned, under given circumstances.*

In *Central Vermont Railway* v. *Bethune,* 206 Fed., 868 (C. C. A. 1st, 1913), an action for damages was brought under the employers' liability statutes of the United States. The statutes were construed to mean that the employee assumed the risk of the employer's negligence in all cases except

where there was a violation of the statute. In discussing the question whether the employee contracted to assume such risk, or whether the law imposed such risk upon him, the Court, on page 875, said:

> "In the attempts made by various courts and text-writers to explain and support the doctrine of assumption of risk, there are many expressions indicating the view that it is implied in the contract of employment; but there is nothing of the kind. It is merely a practical rule of common sense, which leaves to the owners of houses and other establishments, especially to agricultural holders, a necessary privilege of constructing and maintaining their premises according to special circumstances, the stringency of finances and the custom of the country. This proposition was properly summarized in *Pollock on Torts* (Webb's edition, 1894), where in treating the maxim of *volenti non fit injuria*, this particular topic was taken up, and the observations made distinctly at page 195 that the rule 'is in itself independent of the contract of service or any other contract'."

On this point *Labatt on Master and Servant*, Section 260, at page 592, says:

> "Obviously, however, this theory is borne out only to a very limited extent by the actual facts of everyday life, and for this reason it cannot be regarded as anything more than a convenient juristic fiction, propounded for the purpose of obtaining a rational foundation for a doctrine already formulated."

Bohlen, in 20 *Harvard Law Review*, 14, on the subject of "Voluntary Assumption of Risk," at page 31, says:

"The contract of service afforded a convenient medium through which the master might be relieved from this intolerable burden. Into it was bodily read, because commercial necessity required it, 'an implied stipulation that the servant should assume the risks of the negligent acts of those fellow servants with whom he might expect to be associated, upon whose care his safety might be expected to depend.' Such a method was in accordance with the judicial tendency of the time, which was to refer if possible all obligation to the consent of the party on whom it was laid, and which thus led courts to consider all duties imposed by policy of the law on a relation created by contract as founded on some presumed fictitious term in the contract creating the relation."

In accord with the foregoing proposition that the duty of the master is an imposed duty and depends upon the law of the place of accident see also:

Boston, etc., Railroad v. *McDuffey,* 79 Fed., 934 (C. C. A. 2, 1897).

Pennsylvania Railroad v. *Fishak,* 123 Fed., 465 (C. C. A. 6, 1903).

Dormidy v. *Sharon Boiler Works,* 127 Fed., 485 (C. C. Pa., 1904).

In re Crescent Lumber Co., 154 Fed., 724 (D. C. Ala., 1907).

Alabama Railroad v. *Carroll,* 97 Ala., 126,

Schlemmer v. *Railway,* 205 U. S., 1.

Kansas City Railroad v. *Becker,* 48 Ark., 460.

Curtiss v. *McNair,* 173 Mo., 270.

The Principles Here Contended for do not Tend to Destroy the Uniformity of the Admiralty Law.

If it be said that the effect of saving to seamen the benefit of the rules of common law in actions brought by them for injuries will destroy the uniformity of the admiralty law, our answer is that the admiralty law remains unaffected thereby. The admiralty law will always be administered by the admiralty courts, which have the power and authority to work out their own system of law according to their own ideas of justice. In fact, the courts of admiralty have had occasion during the development of that law to look to the common law for rules of guidance, and have borrowed many of those rules and incorporated them into their own system. The principles of admiralty are comparatively few, particularly in the law of torts. They fail in many cases to cover the points which arise in a growing commercial world, while the common law is more highly developed; its principles are many, and it readily applies itself to any conditions which may arise. The common law does not differ greatly in the various states of the Union. The underlying principles are the same, and the difference, where there is a difference, is mainly in its application.

There can be no result here which is contrary to the intent of Congress. When that body left open the common law over torts committed at sea it must have contemplated just such a case as this. If it had been essential that the admiralty jurisdiction be made exclusive, we believe that Congress could, without offense to constitutional provisions, have made it so.

The Moses Taylor, 4 Wall., 411.
Matter of Long Island Transp'n Co., 5 Fed., 599.

Nevertheless, whatever the reason be, the courts of common law have jurisdiction, and they should be allowed to retain it and to measure liability according to their own standards.

If at any time it should develop that greater uniformity is needed, the power always rests with Congress to attain that end by appropriate legislation. This it has done in the case of the Federal Employers' Liability Act. Before that act was passed, although Congress had power over interstate commerce, the liability of interstate carriers for injury to employees was governed by the law of the state where the injury occurred.

Texas & Pacific Railway Co. v. *Carlin*, 189 U. S., 354.
Missouri Pacific Railway Co. v. *Mackey*, 127 U. S., 205.

That has been changed, but until Congress takes it upon itself to act regarding "the common law of the sea" the present common law should apply.

The Principle Underlying the Foregoing Cases.

It is true that some cases on the law side of our courts refer to admiralty law and some on the admiralty side refer to common law, but from that it does not follow that one court will indiscriminately follow the law of the other court. We believe that the true rule is as follows: Admiralty courts often follow the common law, for the reason that the law of admiralty, being, as it is, a collection of a few rules and customs of the sea which are grossly inadequate to cover its needs, has incorporated into itself, and literally borrowed, common

law principles which have, in the course of time, become firmly imbedded in the admiralty system. Common law courts *never* apply admiralty law as the law. If an action be brought *on a maritime contract*, then the contract will be construed in the light of the law of the sea, and the result will be the same, no matter where the action be brought. If a case arise in a common law court where the relief demanded be the same as in an admiralty court, the relief will not be granted unless it can be based upon some principle known to the common law. Thus, a seaman suing in a common law court for damages for failure of the ship owner to supply him with treatment for his injuries will recover—the action being based upon contract (*Harden* v. *Gordon*, 2 Mason, 541). He recovers because of the contract obligation and because the common law interprets that contract in the light of the law of the sea under which it is made. This rule does not require that a court of common law apply the admiralty law. (See also *Holt* v. *Cummings*, 102 Pa. St., 212.)

When, however, a case arises in a common law court where the relief demanded cannot be sustained on some principle known to the common law, the common law courts will refuse to act. Unless such a principle can be applied, the remedy asked for is not a remedy which the common law is competent to give.

The application of this theory can be seen upon a consideration of those cases which hold that a court of common law has no jurisdiction over an action to recover salvage.

Lipson v. *Harrison*, Q. B., 1854; 24 Eng L. & Eq., 208.
Merritt v. *Tice*, 77 N. Y. App. Div., 326.

If there be a contract to pay salvage, a court of common law has jurisdiction, for the reason that the relief demanded can be sustained on common law principles—the principles which apply to the contract which the parties have made.

Plaintiff, the Petitioner Here, Should Have Been Allowed to Go to the Jury on the Facts.

If the common law furnishes the rule of liability in this case, it now becomes necessary to consider what particular rule is to be applied. Our position, briefly, is that:

1. The rights of petitioner must be determined according to the common law principles applying to master and servant.
2. The fellow-servant rule was abrogated in the case at bar by Section 20 of the Seamen's Act.
3. The order given by the engineer was a negligent order given in the course of his employment to petitioner, who was subject to his authority.
4. That because of the inability of petitioner to refuse to obey it cannot be said, as matter of law, that he assumed the risk of injury or was guilty of contributory negligence in obeying.
5. That the owner was, therefore, liable to petitioner for the injuries sustained.

There is no question involved of the validity of a state statute amending the law, but the common law has been amended by a Federal statute which the court below did not apply.

Section 20 of the Seamen's Act of March 4th, 1915 (Sec. 8337a U. S. Compiled Statutes, 1916), provides:

> "In any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

From its very wording there can be no doubt that its framers intended it to change the common law rule of fellow-servant. It presupposes an existing body of law and changes that law by removing in certain cases the obstacle to recovery. The construction placed upon it by the Court below deprives it of its very life and purpose; for the Court said that Congress has removed an obstacle which does not exist and has created no new rights thereby (R., pp. 40, 41).

We contend that the obstacle to recovery in common law actions by seamen for injuries before the passage of that statute was the fellow-servant rule. We believe that this statute in its present form removes the obstacle and creates a liability in an action at common law as effectually as if it read, "A seaman may recover damages for personal injuries where they are caused by the negligence of a seaman having command."

It is an entirely different question whether that statute is sufficient to change the law in the admiralty courts. That is considered under a subsequent point.

Under the common law, unamended, the fireman whose negligent act caused this injury was a fellow-servant of petitioner, and, in the absence of the statute, defendant, of course, would not be responsible for his acts resulting in injury to petitioner.

There was been of recent years much discussion regarding the abrogation of the fellow-servant rule, and the statute was undoubtedly passed as a result of that agitation.

At the risk of being elementary we state the fountain head of the law of fellow-servant, the rule having been first authoritatively laid down in this country in *Farwell* v. *Boston & Worcester Railway Co.*, 4 Metcalf, 49, by Mr. Chief Justice Shaw. The facts of the case are as follows: Farwell, an engineer employed by the defendant company, was seriously injured in an accident admitted to have been caused by the negligence of a switchman employed by the defendant in leaving a switch in "wrong condition." For that negligence the plaintiff claimed liability of defendant. The only question involved in the case was whether this so-called "fellow-servant rule" was a defense. The Court, in holding in the affirmative, defined the rule, page 59:

> "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other."

There does not seem to be anything in the rule to prevent it from applying to seamen, and, as will be

hereinafter shown, it has been so applied since the beginning of our reports.

In an earlier case than this—*Murray* v. *Railway*, 1 McMullan, 385—the Court said, in applying the principle of fellow-servant to a steam railway:

> "The principle is the same, whether you apply it to a railroad, a steamboat, a wagon, a stage-coach or a ship. If plaintiff is to recover, I can see no reason why the owner of any of the above modes of conveyance should not be liable under the same circumstances."

For the purpose of showing that the sole reason for the denial of a recovery was based upon the "fellow-servant rule," the Court in the *Farwell* case pointed out that if the road were owned by one set of proprietors who employed the switchman and the plaintiff were employed by another set of proprietors who operated the cars, there would be a recovery for the negligence imputed in this case—and this by the simple rule of *respondeat superior*, unaffected by considerations of fellow-servants.

The fact that the rule is a bar and that recovery is allowed when the bar is removed, is further illustrated by those cases which hold that a servant who is not acting as a servant at the time of the injury and is injured through the negligence of a servant of the same master may recover.

> *Orman* v. *Salvo*, 54 C. C. A., 265, and 117 Fed., 233;
> *M., K. & T. R. R. Co.* v. *Hendricks*, 49 Tex. Civ. App., 314,

and also by those cases which apply the so-called "vice-principal" and "superior servant" rules, and allow recovery.

The Fellow-Servant Rule Being Abrogated, Defendant Was Liable by the Rule of Respondeat Superior for the Act of the Fireman in Giving the Dangerous Order Causing Plaintiff's Injury.

The general rule of the liability of the master for the act of his servant within the scope of the employment is too well known to require extended discussion here. It is difficult to point to any case in the common law reports where the master was held liable in a case like the present, for the reason that the fellow-servant rule has stood as a bar. But there is the line of cases holding that for the acts of a servant who is a vice-principal the master shall be liable to one who is a co-employee. We submit that the statute under consideration makes of a seaman having command a vice-principal, or at least a superior servant, and under the well-known rule of *respondeat superior* the owner of the vessel is liable for his acts done within the scope of his employment.

That the order to dump the ashes was given within the scope of Kayser's employment is too clear to admit of doubt. He was placed in charge of the engine room for the time of the watch, and Chelentis came under his authority. His authority was to direct and "command" those under him. He was in every sense of the word a "seaman having command," and his acts were those of the ship owner. As an old English case puts it, "the driving of the servant is the driving of the master." On that rule the respondent should be held.

The liability of the master under the rule of *respondeat superior* is strikingly shown by the case of *R. R. Co.* v. *Fort*, 17 Wall., 553. In that case a sixteen-year-old boy, employed in the machine shop of the defendant company, was ordered by his im-

mediate superior to ascend a ladder placed among moving machinery and there adjust a belt. He did so and received injuries resulting in the loss of an arm. The company denied liability upon the ground that the foreman was not justified in giving or authorized to give an order to perform so dangerous a piece of work. Of this Mr. Justice Bradley, speaking for this Court, said:

> "For the consequences of this hasty action the company are liable, either upon the maxim of *respondeat superior* or upon the obligations arising out of the contract of service. The order of Collett (the so called foreman) was their order. They cannot escape responsibility on the plea that he should not have given it. Having intrusted to him the care and management of the machinery, and in so doing made it his rightful duty to adjust it when displaced and having placed the boy under him with directions to obey him, they must pay the penalty for the tortious act he committed in the course of the employment. If they are not insurers of the lives and limbs of their employes, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so."

This case, although an incident of an injury to a boy of immature years, does not turn upon that question. The controlling point is that an order was given which greatly increased the hazard of the employment, and the Court would not say that the boy should have refused to obey it. It is similar in many respects to the case at bar. Chelentis, although an ignorant seaman, saw the danger connected with the execution of the order given by the engineer, yet, having been brought up to the discipline of the sea, he obeyed his superior officer.

We submit that under the rule in the preceding case the order of the fireman was the order of his master, the owner of the ship. The discipline on board even a merchant ship is severe. Refusal to obey an order is severely punished. Chelentis obeyed because he knew of that discipline and knew the consequences of refusal.

Plaintiff Did Not Voluntarily Assume the Risk of Injury.

Under the common law a workman by entering into the employ of another assumes all risks which are reasonably to be encountered in the conduct of the business. He does not, however, assume extraordinary risks. The doctrine of assumption of risk has been built up on the theory that a person by remaining in another's employ may not charge that other with damages resulting from conditions as well known to the employee as to the employer. It assumes upon the part of the employee the right to discontinue the employment upon the discovery of conditions making the employment extra-hazardous. An employee in assuming a risk must act voluntarily. This Court has recently had occasion to consider the effect of an agreement by the master to remedy a defect, and has held in the case of a locomotive engineer that such an agreement is sufficient to justify the engineer in remaining at work for a reasonable period without assuming the risk of injury as matter of law.

Seaboard Air Line v. *Horton*, 233 U. S., 492, 504, and 239 U. S., 595.

This was in the case of a landsman, who might have given up his employment at will. If he, know-

ing of the defect in the machinery, was justified in remaining at work simply because the employer promised to remedy the defect, how much more so was the plaintiff in this case justified in remaining in the employment and executing the order when he was bound by his shipping articles to strict obedience and was ordered against his protest to continue the dangerous work?

We do not ask the Court to formulate any new rule of law or to borrow one from the admiralty to cover these facts. The common law applies to any case arising under it. Its principles are flexible and it fits any state of facts which might arise.

It was shown at the trial that when plaintiff came up onto the deck to dump the ashes he saw the dangerous sea running on the port side of the ship, where the ashes had to be dumped; that he then went to the engineer in charge of the watch and asked him for another man to help him and his mate with the job; that this request was refused, and the engineer ordered him to proceed with the work in the regular way, and that plaintiff was injured while carrying out this order. The regular way was to dump them on the port side, where two men could do the job, whereas to dump them on the starboard side required three men, owing to the presence of a cross-bunker, over which the bags of ashes had to be lifted.

The defendant's counsel contended at the trial that plaintiff voluntarily assumed the risks of his employment. The learned Trial Judge agreed with him, and he considered the protest of the plaintiff against doing the work in the manner directed important only in so far as it showed that he knew of the risk of being washed overboard by the heavy seas. He seemed to assume that plaintiff should

have refused to obey the order. Thus, at the close of the trial, the following dialogue ensued between Court and counsel (R., fol. 53), Mr. Graves being the plaintiff's trial counsel:

> "The Court: Where is your negligence?
>
> Mr. Graves: The direct testimony is that the order was to dump it over the port side.
>
> The Court: Suppose he was told to jump overboard, is he compelled to do that?
>
> Mr. Graves: No, but this is an order given in the navigation of the ship.
>
> The Court: Suppose he told him to go over and strike another man. Does he have to do that?
>
> Mr. Graves: Well, my contention is that that is a question for the jury. Of course, you are putting an extreme case. As I understand it, they have to do practically everything they are told to do on board a ship.
>
> The Court: That may be the practice, but the law must be observed."

Now, what is the law that must be observed? If a seaman be allowed to consider the advisability of obeying every order that is given, the discipline on ships must go by the board. Plaintiff was not in the position of a landsman who might give up his position at will and seek other employment. He was on the high seas, bound by his shipping articles and by the rules of discipline in force there. *He could not refuse to obey.* His protest was overruled, and he must needs be guilty of mutiny or obey his order—and he obeyed.

Shall he now be told that he voluntarily assumed the risk of injury arising out of the dangerous situation which was so clear to him?

The answer to this is found in a few well reasoned cases, and in *Labatt on Master & Servant,*

Vol. 3, Sec. 1201, where, in discussing the question of assumption of risk by a seaman, that author says:

> "It is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landsmen are theoretically supposed to possess, of abandoning their employment the moment they are exposed to an abnormal risk."

In *Thompson* v. *Herman*, 47 Wisc., 602, the plaintiff, a seaman, was injured while adjusting certain of the rigging under the master's direction. He had protested against the method employed as being highly dangerous, but obeyed the imperative orders of the master to do the work as first suggested.

The Supreme Court of Wisconsin held that the seaman had not assumed the risk, saying, at page 609:

> "The plaintiff avers that he used care, or was not in fault, in attempting with others to execute the orders of the master, and that he submitted to the judgment and authority of the master after protest, and thus most clearly brings himself within the protection of these principles, and establishes his right of recovery. He could not have safely or lawfully done otherwise than submit under the circumstances; for his disobedience would have been revolt and mutiny, and he

> would have been liable to personal hazard and punishment; and to hold, under such circumstances, that he cannot recover for his own personal injuries, received without any fault of his own, and solely by the careless and unreasonable orders of his superior, would be outrageously unjust."

Again, at page 608:

> "The seaman on the voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury."

In *Robertson* v. *Baldwin*, 165 U. S., 175, it was said:

> "It must be considered that on board ship a sailor is not expected to, nor, for that matter, permitted before executing an order, to question the propriety of the order."

In *La Fourche Packet Co.* v. *Henderson*, 94 Fed., 871 (C. C. A., 5th Circuit), the same rule was applied and a seaman was held to be justified in obeying the order as given. This was an admiralty case, but a common law principle was applied.

See also *Curtis on Rights & Duties of Merchant Seamen*, page 11, cited in the preceding case.

It Cannot be Said as Matter of Law that Petitioner Was Guilty of Contributory Negligence.

For reasons similar to those which prevent the defense of assumption of risk from being a bar to an action by a seaman it is held that negligence cannot be imputed to such an employee merely for the reason that he does not refuse to perform a duty which will expose him to an abnormal risk.

> *Eldridge* v. *Atlas S. S. Co.*, 134 N. Y., 187.
> *Labatt on Master & Servant*, Vol. 3, Sec. 1215, Sub. c.

In the *Eldridge* case the plaintiff was ordered to operate a winch which was unsafe. It does not appear that he protested against the order, and the Court assumes that he knew the condition of the winch. The Court says, page 190:

> "The defendant insists that the command to operate this dangerous winch was not lawful, and therefore, plaintiff might rightfully have refused obedience. If it be conceded that the command was unlawful, it does not necessarily follow that plaintiff's obedience was negligence. For whether the command was lawful or unlawful, the evidence is to the effect that his disobedience would have resulted in his punishment. The boatswain, under whose orders plaintiff was operating the winch, testified that the plaintiff 'was bound to obey the order that I gave him; if he did not obey the order he would have been put in irons and fined.' Grant that the plaintiff had been so learned in the law as to know that the courts would ultimately decide that the command was unlawful, and disobedience to it lawful, he could know no way of escape from the ship's punishment for his disobedience for there was none. The

jury found in effect that he was coerced through fear of punishment into obedience. If the command was unlawful, the defendant's case is not improved by the fact that the punishment it would visit upon disobedience was also unlawful. In any event the plaintiff was in a dilemma. He had to choose between present punishment with a possible hope of remote justification and customary obedience to orders with the hope that by care he would escape injury. Grant that he had made a mistake in judgment under these difficult conditions, the law does not adjudge it to be negligence, and the jury upon consideration have refused to do so."

To the same effect also are

Anderson v. *New York & Cuba Mail S. S. Co.*, 13 N. Y. A. D., 18, and
Keating v. *Pacific Steam Whaling Co.*, 21 Wash., 415.

At any rate, under the Federal rules the burden of proving contributory negligence is upon the defendant.

Ind. & St. L. R. R. v. *Horst*, 93 U. S., 291.
Hough v. *T. & P. R. R.*, 100 U. S., 213.

There Was Evidence to Sustain a Holding that the Engineer Was Negligent in Giving the Order.

Can it be said, in view of the facts in this case, that Kayser acted as a reasonably prudent man would have acted under the circumstances? The danger of carrying ashes across the port side of the vessel was apparent to anyone. The danger was called to his attention. Instead of furnishing the

aid of a third person in order to make possible the dumping of the ashes in a safer way, or even ordering the work deferred, he directly commanded plaintiff to dump them over the port rail (R., fols. 27, 29, 40), there being no life lines or other devices at plaintiff's disposal (fol. 47).

Here was clearly an act of negligence. As was said by Mr. Justice Pitney in *Ches. & O. R. R.* v. *Profitt*, 241 U. S., 462, 468:

> "To subject an employee without warning to unusual dangers, not normally incident to the employment, is itself an act of negligence."

Of course plaintiff had warning, but that does not alter the case. Nothing that he could have said or done would have prevented his injury.

One of the grounds advanced by defendant's counsel in his motion to dismiss the complaint was that the injury was caused by an act of God (R., fol. 53). This is not so. The cause of the injury was the negligent act of the engineer in placing Chelentis in a dangerous position where he could not help himself. The condition of the weather made it even more essential for the engineer to see that the work was done in the safest manner possible.

Southern Pacific Co. v. *Schoer*, 114 Fed., 466.

The Assistant Engineer Who Gave the Order Complained of Was a "Seaman Having Command" Within the Meaning of the Act.

The evidence adduced by the plaintiff at the trial clearly showed that plaintiff was under and subject to the orders of one Kayser, who was first assistant engineer and in charge of the watch during which the accident occurred. True, the plaintiff was not in Kayser's watch, so far as the records of the ship might show—he was in the preceding one—but he had stayed over into Kayser's watch, as was the custom, in order to dump the accumulated ashes. He was in every sense of the word subject to the orders and authority of Kayser, and Kayser most certainly was in command, so far as plaintiff was concerned. Certainly Kayser was the best judge of this, and it was he who gave the order in question and insisted upon its being obeyed by the plaintiff; both the Trial Judge and the Circuit Court of Appeals found that plaintiff was subject to the authority of Kayser.

The Trial Judge seemed to have some doubt about whether an engineer could be considered a "seaman having command." He seemed to think that an officer was intended to be designated by that phrase. The Circuit Court did not consider this point at all.

We believe it to be clear that Kayser, who was the first assistant engineer and in charge of the boiler room, was a "seaman having command," and that the statute made the owner liable for his negligence.

In *The Coluza,* 241 Fed., 568, the District Court for the Northern District of California held that a boatswain is a "seaman having command." This case has been affirmed by the Circuit Court of Appeals for the Ninth Circuit.

If Congress had intended to refer to officers it would not have used the term "seaman," for the

usual and accepted meaning of that word is "any person who aids in the navigation of a ship *with the exception of the officers*" (*Standard Dictionary*), and in the Seamen's Act it is defined:

> "In the construction of this Title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; *and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a seaman.*"
>
> 8392 U. S. Compiled Stat., 1916 (see 4612 R. S.).

On board a ship there might well be many "seamen having command." We do not believe the statute means command of the ship—the whole ship—it means the authority to direct in some department of the ship.

The discipline on board a ship is in many respects similar to that existing in a military establishment where there are many "having command," although but one has supreme command. The command of the most humble corporal is just as binding within his sphere of action as is that of the commanding general. He must be obeyed by those under him, or the discipline of the organization must fall.

If this statute is to be of any worth it should not be restricted to the case of an officer "having command" or a seaman having command of the entire vessel. The orders which come to a seaman come mainly from those who are immediately over him, and this narrow construction would deprive him of the benefit of the statute in all cases where the act causing the injury was done by another than the master of the ship.

In *The Union,* 24 Fed. Cas., 537, 543, the Court (S. D. N. Y.) recognizes that commands may come to a seaman from others than the master, and that he is none the less bound to obey them.

The purpose of the Seamen's Act was to "promote the welfare of American Seamen" and to "promote safety" at sea. Throughout the Act the master is referred to as the "master," and is frequently mentioned. If Congress had intended anything but "seaman" having command it would have said so. Furthermore, the language is "seamen" having command, and those under "their" authority. If the master had been intended, why was the plural form used?

In the State of New York the Employers' Liability Act contains a provision that the employer shall be liable for injuries caused "by reason of the negligence of any person in the service of the employer entrusted with any superintendence or by reason of the negligence of any person entrusted with authority to direct, control or command any employee in the performance of the duty of such employee." Labor Law, Sec. 200.

It would seem that the meaning of that statute is substantially the same as the one here involved, the term "having command" being more of a maritime term and corresponding with the land expression "exercising superintendence."

That statute has been many times construed. In *Proctor & Gamble Co.* v. *Williams,* 106 C. C. A., 45, it was held (following the construction placed upon it by the state courts) that the purpose of the statute was to secure proper superintendence for all workmen; that it was not necessary that a person be formally authorized by the employer to be such a superintendent, but that the statute should be liberally construed to include all persons

in the employ of the master having duties as foremen, superintendents, and the like.

In *Guilmartin* v. *Solvay Process Co.*, 189 N. Y., 490, it was held that if the order which caused the injury was even a mere detail of the superintendent's work, the employer would be liable. At any rate, it would appear from this case that the question whether or not the person was exercising superintendence is for the jury.

In *Cashmore* v. *Peerless Motor Car Co.*, 154 N. Y. App. Div., 914, it was held that an employer is liable for the acts of a servant entrusted with authority to direct, control or command another employee in the discharge of his duty, no matter how limited that authority might be. In this case the injured person was a machinist's helper; the foreman was the machinist.

In *Larkin* v. *Burke*, 212 Fed., 148, it was held that the negligence of a blasting foreman rendered the master liable.

At any rate, the question as to whether or not a certain person is a superintendent is for the jury.

McBride v. *N. Y. Tunnel Co.*, 113 N. Y. App. Div., 821.

Devine v. *Hayward*, 128 N. Y. App. Div., 705.

In *Williams* v. *Citizens Steamboat Co.*, 122 N. Y. App. Div., 188, it was held that a master might have and be liable for the acts of many superintendents, each supreme within his own sphere of action.

In a very recent case (*Pelow* v. *Oswego Construction Company*, 217 N. Y., 506) the New York Court

of Appeals has held that if one person have authority, however slight, to direct others in the employ of the master, the master is liable for his negligence causing injury to the subordinate.

The Employers Liability Act of Utah is in form more analogous to the Seamen's Act, for instead of directly creating a remedy it removes an obstacle.

> "1342. All persons engaged in the service of any person * * * who are intrusted by such person * * * with the authority of superintendence, control or command of the other persons in the employ or service of such employer, * * * are vice principals of such employer, and are not fellow servants."

Of this provision the Circuit Court of Appeals for the 8th Circuit said:

> "This declaration is a plain departure from the general rule of law which we have been considering; an unequivocal declaration that servants who have the authority to direct and superintend other servants are vice-principals of their masters. * * * There is no ambiguity in the terms, no uncertainty in the meaning of this statute, and no possible doubt of the purpose of the legislature in enacting it. It is too positive to be disregarded, too plain for construction, and its manifest legal effect cannot be ignored."
>
> *Southern Pacific Co.* v. *Schoer*, 114 Fed., 466.

These cases, although they have arisen under an entirely different statute, furnish a valuable analogy to the legislation in the case at bar. The intent of the Seamen's Act is clear. Respondent placed the engineer in authority. Chelentis came under that authority and was directed to perform certain work. He tried to use his discretion in its

performance, and when he protested the order was made more emphatic. On every principle of law and justice the master should respond. This Court has laid down the rule that questions of negligence do not become questions of law to be decided by the Court, except where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish.

Gardiner v. *Mich. Cent. R. R.*, 150 U. S., 349-361.

Kreigh v. *Westinghouse & Co.*, 214 U. S., 249.

A jury might well have found that no reasonably prudent man would have insisted upon the execution of the order under the circumstances, and we respectfully submit that the learned Court erred when it refused to allow the case to go to the jury.

PART II.

Petitioner was entitled to recover under the Maritime Law as amended by Section 20 of the Seamen's Act.

If the Court considers the first point of petitioner to be well taken, that is, if it considers the common law as furnishing the rule of decision in this case, then it is unnecessary to examine into the condition of the admiralty law regarding the rights of the seaman against the shipowner for injuries sustained in the service. On the other hand, if it con-

siders the admiralty law as applicable to all cases within its jurisdiction, regardless of the forum in which they are litigated, then it will be proper to inquire upon what principle the denial of recovery in the admiralty courts has been based. If it has been based upon the fellow-servant rule, then Section 20 of the Seamen's Act should apply and should have the effect of abrogating that rule and allowing recovery where a seaman is injured through the negligence of a seaman having command.

If the learned Court below be correct in its statement that it is immaterial whether the injured person and the person causing the injury are fellow-servants, then many respected admiralty authorities have been in error for many years. A review of the decided cases we believe will conclusively establish that the fellow-servant rule has been and is as much a part of the admiralty law as it is of the common law, and that the Courts in stating that a ship is liable only for injuries resulting to a seaman because of the unseaworthiness of the ship have been stating a common law principle couched in maritime language; the equivalent of saying that a master is bound to furnish his servants with a reasonably safe place in which to work and with reasonably safe and proper appliances for the accomplishment of the work necessary to be done.

Hon. Harrington Putnam of New York, in an article in *Case & Comment*, July, 1915, entitled "Death on the High Seas," says:

> "Except the minor matters of assault upon seamen on shipboard and collision with vessels gathered in the fairways, the old sea laws say little as to maritime torts. Even today the law of personal torts as adminis-

> tered in admiralty is largely borrowed from the common law, as it has been developed and extended by legislation, professing to regulate affairs upon land."

If this version be correct, and we believe it is, it is difficult to understand how the admiralty law, regulating torts between master and servant, can differ greatly from the common law, and particularly on a rule of such universal application as the rule of fellow-servant.

Hughes on Admiralty, page 183, Section 101, says:

> "The relation between the crew and the ship or her owners is substantially the same as the relation between master and servant at common law, in so far as it bears upon the question of torts to the person."

Burdick on Torts, page 12 (note), says:

> "It is to be borne in mind, however, that many torts were and still are cognizable by admiralty courts, but the legal principles applied to such cases are those of the common law. Cases of assault or battery, or other personal injury on board a ship on the high seas, are within the jurisdiction of admiralty courts, but they are decided in accordance with common law doctrines" (citing *Stern* v. *French Line,* 110 Fed., 996).

Thompson on Law of Negligence (2nd Ed.), Vol. 4, page 399, says:

> "In other words, outside of statutory rules, the owner of a vessel stands under the same duty of exercising reasonable care to make the vessel, its tackle and appliances safe for the use of the seamen by which it is manned, which the law puts upon any other employer

> in favor of his servants. If there is any difference in the rule between a ship at sea and a railway train or a manufacturing establishment on land, it is in favor of the seafaring servant; for the obvious reason that the master of the ship is the sovereign of the deck, may exercise compulsory power over the sailor, and may order him into whatever place of danger he pleases and the sailor has no alternative but to obey."

The case of *The Osceola, supra,* has been construed by the Court below to hold that the admiralty provision for maintenance and cure is exclusive of all other claims the seaman might have arising out of the injury, unless the injury be caused by the unseaworthiness of the ship. The Court has applied this rule without looking to see from whence the rule came and what the reasons for the rule are. We propose to show that the admiralty courts have followed the courts of common law, and that the reason why the ship owner is liable only for failure to supply a seaworthy ship is that, under that law, unamended, all on board a ship are fellow-servants, and if the ship be seaworthy, then, obviously, any injury which occurred would have to be caused by either the negligence of the injured person or one of his fellow-servants, and, therefore, there could be no recovery. If, on the other hand, the ship were unseaworthy and a seaman was injured because of it, he was allowed to recover damages upon the theory that the ship owner had failed to supply him with a reasonably safe place in which to work, that expression being synonymous with "seaworthy vessel."

It is hardly to be believed that this Court intended, when it decided *The Osceola* case, to promulgate any new rules of law respecting seamen. It

was simply declaring what the law was. Now, if the decisions upon which the Court based its ruling were founded upon the fellow-servant rule, then, surely, the decision reached must have the same foundation.

A review of the authorities cited in this case will be helpful.

The Osceola and the Decisions Upon Which it is Based.

The Court first states that the recovery, if any, must be based upon the admiralty law, or upon a local statute, and then cites the various old sea laws, and concludes that under the ancient maritime law there was a provision for maintenance and cure, but no provision for an indemnity to an injured seaman. There is no affirmative statement in any of these ancient laws to the effect that an indemnity shall *not* be paid—they simply do not provide for one. The Court then refers to the English Merchant Shipping Act of 1876, which requires that a ship owner must provide a seaworthy vessel, and to the English *common law decision* in *Hedley* v. *Pinkney & Sons S. S. Co.* (1894), A. C., 222, which holds that a master of a vessel is a fellow-servant with the crew, and that the personal representatives of a deceased seaman may not recover for his death caused by the negligence of the master in failing to replace certain stanchions on the side of the deck from which he fell. In this case particular stress is laid upon the common employment of the master and seaman as grounds for exempting the owner from liability for negligence. The Court at this point says (*Osceola*, p. 171):

> "In England the master and crew are also treated as fellow servants, and hence it would

> follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. *Hedley* v. *Pinkney, supra.* It is otherwise, however, in Ireland (*Ramsay* v. *Quinn,* Ir. Rep., 8 C. L., 322) and in Scotland, where the master is regarded as a vice-principal. (*Leddy* v. *Gibson*, 11 Ct. Sess. Cas., 3rd series, 304.)"

From this quotation alone the fellow-servant rule seems to be the bar. If there is no indemnity allowed where the master is considered a fellow-servant and one is allowed where he is considered a vice-principal, what doubt can there be that the fellow-servant rule is the obstacle to recovery in the former case?

In the Irish case referred to (*Ramsay* v. *Quinn, supra*) the defense to the action was the fellow-servant rule, but the Court held that the captain was a vice-principal and allowed a recovery for his negligence, saying, at page 325:

> "Under which category, then, is the captain or master of the vessel in this case to be placed? Are we to regard him merely as a fellow servant of the deceased, or as the agent and representative of the defendants? In my opinion he comes within the latter description."

An examination of the Scotch case (*Leddy* v. *Gibson, supra*) discloses the fact that the learned Justice who wrote the *Osceola* opinion was in error in one respect—that is, to the holding of the Scotch courts. In that case the Court considered fully the doctrines of fellow-servant and vice-principal. It held that the captain was a fellow-servant, and the owner would, therefore, be not liable for his negligence.

The next case considered in *The Osceola* is the well-known "maintenance and cure" case of *Harden* v. *Gordon,* 2 Mason, 541. That case says nothing about the question of indemnity for a tort, but holds the right to maintenance and cure to be a contractual right given to the seaman because of the dangerous nature of his employment. There is no statement in the opinion from which it might be inferred that this right to maintenance and cure is exclusive of any right the law might give for an actionable tort. Following this, the Court refers to *The Brig George,* 1 Summer, 151, and *Reed* v. *Canfield,* 1 Summer, 195. The quotation from the latter case, that the owners of the ship are freed from all liability when the cure is completed, must be taken as referring to *liability for maintenance and cure* and not to liability for an actionable tort. The injuries complained of in that case were not caused by the negligence of anyone—a seaman had had his feet frozen—and the question was for how long were the owners liable for maintenance and cure under his contract. The answer given was that they were liable for all expenses necessarily incurred in the cure, and that when the cure was accomplished, at least so far as the ordinary medical means extend, they were freed from all further liability.

Neither does the cited case of *The Brig George* have anything to say about indemnity for a tort—that also is a maintenance and cure case.

In the case next cited, *The City of Alexandria,* 17 Fed., 390, Judge Addison Brown considered the rights of a seaman to an indemnity for a tort, both under the common law and under the maritime law. He held, as to the rights at common law, that

there could be no recovery, for the reason that the injuries were caused by some fellow-servant who left open a hatch through which the libelant fell. With regard to the rights under the maritime law, the most that can be said is that he found no authority for recovery under the maritime law, and, therefore, assumed that no such rights existed.

In *The Edith Godden*, 23 Fed., 43 (1885), next reviewed, the Court held the vessel liable for the breaking of a hook, resulting in injuries to a seaman. The Court clearly applies common law principles of tort. Opinion by Addison Brown, *J.*, page 46:

> "In the use of modern appliances, such as a steam-winch in connection with a derrick, as in this case, not for the prosecution of her ordinary navigation, but for the conveniences of the ship in loading or unloading, it is more reasonable and equitable to apply the analogies of the *municipal law* in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new, *modern conditions for which those limitations were never designed.* And, in applying the analogies of the municipal law the helplessness of seamen, and the imperative duty of obedience, as I have above said, ought to impose upon masters and owners the highest rule of diligence and care in ascertaining the sufficiency of all such modern appliances for the exigencies to which they are to be subjected. As that was not done in this case, the breaking of the derrick through its own insufficiency must be deemed evidence of negligence on their part, which equitably imposes the consequences upon them, rather than upon the seaman, who is an innocent sufferer through their want of proper care."

The next case of importance cited is *The A. Heaton,* 43 Fed., 592 (1890). This is an extremely interesting and important case in the present discussion. The libelant, a seaman, had been injured by the negligence of the master in failing to see that a part of the rigging of the schooner *A. Heaton* was kept in repair; he was injured by the breaking of a rope, which caused him to fall to the deck. The learned Justice who wrote the opinion (Mr. Justice Gray, sitting in the Circuit Court) expressly found that there was plenty of material on board the vessel with which to repair the defect, and that the nature of the defect was such that it was the duty of the master to repair it during the voyage; that the claim could not, therefore, be maintained upon the ground of personal negligence of the owners; he then considered whether there could be other grounds of liability. In this connection he says, page 595:

> "A seaman, taken sick or injured in the service of the ship, has the right to receive his wages to the end of the voyage, and to be cured at the ship's expense. That right indeed, grounded solely upon the benefit which the ship derives from his service, and having no regard to the question whether his injury has been caused by the fault of others or by mere accident, does not extend to compensation or allowance for the effects of the injury; but it is in the nature of an additional privilege, and not of a substitute for or a restriction of other rights and remedies. *Harden* v. *Gordon,* 2 Mason, 541; *The George,* 1 Sum., 151; *Reed* v. *Canfield, Id.,* 195-199-202. It does not therefore displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts."

He then considers the principle of *respondeat superior* as applying to seamen, and refuses to follow the Scotch case of *Leddy* v. *Gibson, supra,* which holds a master to be a fellow-servant with a seaman, saying, at page 595:

> "We are unable to reconcile that decision with the recent judgment of the majority of the Supreme Court in *Railway Co.* v. *Ross,* 112 U. S., 377, which conclusively binds this court. The point there decided, as stated by Mr. Justice Field, in delivering judgment, was that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, and at which speed it shall run, and has the general management of it, and control over the persons employed upon it, is in no proper sense a fellow servant with the brakeman, the porters, and the engineer upon the train; but represents the company, and therefore for injuries resulting from his negligent acts the company is responsible. The reasoning upon which it was there held that engineer might maintain an action against the owners of a railroad train for the negligence of the conductor applies with greater force to a suit by a seaman against the owners of a vessel for negligence of the masters, while she is at sea, beyond the reach of the owners, and the seaman is subject to the absolute control of the master, and cannot if he would, leave the vessel or throw upon his engagement. *No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law.*"

In the above case it will be noted that Mr. Justice Gray applied what he understood to be a common law principle, although he had participated in the *Ross* case and had dissented from its holding.

The vice-principal rule as laid down in the *Ross* case has been overruled. *B. & O. R. R.* v. *Baugh,* 149 U. S., 368; *New England R. Co.* v. *Conroy,* 175 U. S., 323. So the case of *The A. Heaton* cannot now be accepted as an authority. But it is interesting in that it demonstrates the closeness with which the admiralty courts have followed the common law. *They have not only followed its true principles, but they have followed its mistakes as well.*

The A. Heaton was followed by Judge Brown in *The Frank & Willie,* 45 Fed., 494, where recovery of an indemnity was allowed to a seaman who was injured through the negligence of the mate in not having lumber piled properly. This case turns upon the common law rule as laid down in *R. R.* v. *Ross, supra,* and applied to admiralty in the *Heaton* case.

The same can be said of *The Noddleburn,* 28 Fed., 855 (D. C. Oregon, 1886), page 858:

> "But this partial rule has been so modified in the national courts, and those of many of the states, that 'where a servant is authorized and required by his employment to furnish or provide suitable material or appliances for the work in which his fellow-servants are engaged, whether under his special direction or otherwise, and one of them is injured by reason of his neglect or omission in either of these respects, the common master or employer is responsible in either case." *Gilmore* v. *Northern Pac. Ry. Co.,* 18 Fed. Rep., 869; *Hough* v. *Railway Co.,* 100 U. S., 213; *Chicago, M. & St. P. Ry. Co.* v. *Ross,* 112 U. S., 377; *Northern Pac. Ry. Co.* v. *Herbert,* 116 U. S., 647.

The same rule was applied by Judge Brown in *The Julia Fowler*, 49 Fed., 277, where a seaman was injured by the breaking of a triangle upon which he was working. The Court held that the mate who ordered him to work upon it was a vice-principal under the rule in *The A. Heaton*, *supra*, and allowed recovery.

In the case of *Kalleck* v. *Deering*, 161 Mass., 469, which the Court in *The Osceola* refers to as applying a different rule upon the same facts as *The Julia Fowler*, it will be noted that Mr. Justice Holmes, in disposing of that case, considered the mate a fellow-servant and exempted the owner from liability for injuries caused to a seaman by his negligence. This was in 1894, after the *Ross* case had been explained and limited (see pp. 10, 11, 12 of this brief).

In *The Titan*, 23 Fed., 414, another case cited in *The Osceola* opinion, a seaman was allowed to recover damages for injuries sustained through the negligence of the pilot in causing a collision. Judge Wallace said in that case, referring to the pilot, page 416:

> "Within the case of *Chicago, M. & St. P. Ry. Co.* v. *Ross*, decided recently, by the Supreme Court, he was not a fellow servant of the libelant, and the latter is entitled to recover for the injuries he sustained by the collision."

It will be seen from these cases that the confusion has resulted from the one case of *Ry. Co.* v. *Ross* (*supra*). Those cases which were decided while the *Ross* case was accepted as law have granted indemnity upon the theory of vice-principal. Those cases which have been decided since it was overruled have applied the fellow-servant rule

and have denied recovery. After reviewing these cases, the learned Justice said (*Osceola*, p. 175):

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:
>
> 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff* v. *Metcalf*, 107 N. Y., 211.
>
> 3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
>
> 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The soundness of these propositions cannot be doubted.

As to the first proposition: The maritime law provides for maintenance and cure to an injured seaman, and, as above stated, such right is strictly a contract right, being treated by Mr. Justice Story

as really a part of the seaman's wages. (*Harden v. Gordon, supra.*) There is nothing in the maritime law which makes this provision exclusive of other claims. *In fact, it is almost impossible to conceive of a case where a person might so effectually tie himself up by contract as to deprive himself of the right to sue for torts arising out of the contract.* Such a contract would violate every principle of public policy. It would compromise a tort before it was committed and tend to deprive the courts of jurisdiction. The only conclusion that can be drawn is that the right to maintenance and cure is an additional privilege granted to the seaman, and is not exclusive of any other claims the seaman may have for an actionable tort. (*The A. Heaton, supra.*)

As to the second proposition: In the absence of a statute such as the one involved in the case at bar, this proposition is correct. It simply means that in the absence of some negligence attributable to the owners there can be no recovery based upon negligence. *It is a statement of the law; it is not a statement of the reason for the law.* And the American and English cases to which the learned Justice refers show that the reason for this law is that the fellow-servant rule bars recovery unless there is personal negligence on the part of the owners; in the absence of statute, the owner, not being present on the voyage, can be guilty of personal negligence only by failing to supply a seaworthy vessel, or, in other words, a reasonably safe place in which to work.

As to the third proposition: This must be read in connection with the second proposition, for it gives the reason for the law as there stated:

> "That all the members of the crew, except perhaps the master, are, as between themselves, fellow-servants, and hence seamen cannot recover," etc.

It is this proposition, however, which caused some confusion in the court below. The Court in *The Osceola,* while not expressly deciding whether the master was a fellow-servant, refused to hold the owners for his negligence resulting in injury to a seaman. The Court below gathered from this that it made no difference whether or not he was a fellow-servant—that by force of the maritime law there could be no recovery unless the ship were unseaworthy. Such conclusion as this cannot be sustained by the authorities. All of the cases which have been cited show that all the crew are, as between themselves, fellow-servants for all purposes. The master is a fellow-servant with the seaman as to all matters connected with the navigation of the ship; but as to other matters, such as the duty to supply an injured seaman with treatment for injuries, he is the *alter ego* of the owners. It would not have been proper for the Court to decide the question certified as to whether the master was a fellow-servant. The only way they could have answered it would have been by giving a long explanation. If *The Osceola* had said that the master was a fellow-servant with a seaman, then, if he failed to supply a seaman with treatment for injuries and the seaman suffered damages thereby, it might be argued that his negligence was negligence of a fellow-servant for which there could be no recovery.

As to the fourth proposition: This must be read in connection with the others. It says the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew,

but it does not give the reason for the rule. This proposition is sometimes cited to prove a peculiar rule of the admiralty denying relief to an injured seaman. But there is no authority for any rule of this kind unless it is based upon common law principles abundantly shown by the cases heretofore cited.

Other Cases Applying the Fellow-servant Rule to Injuries on Ship Board.

To set forth all the cases in our reports in which common law principles have been applied to maritime injuries would be to extend this brief to intolerable limits. However, we refer briefly to a few of the leading cases in admiralty courts which directly apply the fellow-servant rule.

In *The Queen*, 40 Fed., 694 (S. D. N. Y.), Judge Addison Brown said, at page 697:

> "As to third persons, all the ship's company represent the owner in the work assigned them, and their negligence makes the owner liable. As between themselves, no one more than another, in the ordinary work of navigation, represents the owner, or performs an owner's duty, and, therefore, each takes the risk of the other's negligence. In the case of *The Bernia*, both in the Court of Appeal and the House of Lords, it is said that no recovery could be had by the seaman against his own vessel. Per Lord Bramwell, L. R., 13, App. Cas., 14, and per Lord Esher, L. R., 12, Prob. Div., 83."

This was a case of a collision between two vessels. To the libelants, who were fellow-servants of the pilot, one-half damages were allowed. To the

two Government inspectors, who were passengers on board and not members of the crew, the Court allowed full indemnity.

The Sachem, 42 Fed., 66 (E. D. N. Y.), Judge Benedict (1890), action in admiralty, seaman's leg broken by swinging boom: The Court found that the cause of the accident was negligence of a fellow-servant in letting go of a rope too quickly. No suggestion of the theory of unseaworthiness as a basis of liability or non-liability is mentioned by the learned Judge. On the contrary, he applies common law principles, and cites *Ryay.* v. *Ross* (see the following):

> "Upon the testimony, I think the weight of the evidence is to the effect that Scotty let go the heel rope without orders from the mate. This being so, the case is one of damage cause by negligence of a fellow servant, for which the libelant cannot recover. If it could be found, upon the testimony, *that the injury of the libelant resulted from the negligence of the mate in directing the heel rope to be cast off, a question would then be raised* very similar to the question decided by the supreme court in the case of *Railroad Co.* v. *Ross*, 112 U. S., 377, 5 Sup. Ct. Rep., 184, where the court held the negligence of a conductor of a railroad train to be the negligence of the railroad company. That decision might be found to be authority for holding that the chief mate of a ship, in charge of the deck, authorized to command the movements of the ship, to direct when she shall start, when she shall stop, and ship and owners thereof are responsible for injuries resulting from his negligence."

In *The Bolivia,* 59 Fed., 626 (D. C. S. D. N. Y.), Judge Brown says, page 628:

> "The load was landed upon the platform on the hatch of the orlop deck where it belonged. It was landed too suddenly, whatever the cause, so that several of the boxes bounded off, and fell into the hold. The too sudden descent plainly arose from the mistake or fault of the winchman. As he was a fellow workman with the libelant, his errors were one of the risks of the libelant's employment. *Quinn* v. *Lighterage Co.*, 23 Fed., 363; *Steamship Co.* v. *Merchant*, 133 U. S., 375; *The Queen*, 40 Fed., 694, 696."

The Miami, 93 Fed., 218, applies the fellow-servant rule and denies recovery:

> "The negligence was that of the three men (the mate and the two seamen) in carrying out the instruction to reduce the number of turns around the drum. When participating in this particular work, the mate was not acting as master or vice principal, but as an ordinary seaman, or, at most, as the foreman of a gang performing ordinary seamen's work. The case is within the rule laid down in *Quinn* v. *Lighterage Co.*, 23 Blatchf., 209, 23 Fed., 363, and clearly distinguishable from the cases cited by the appellant: *Peterson* v. *The Chandos,* 4 Fed., 645; *Daub* v. *Rway. Co.,* 18 Fed., 625; *The Sachem,* 42 Fed., 66; *The Titan*, 23 Fed., 413, and *McCullough's Adm'x* v. *Steamboat Co.*, 20 U. S. App., 570, 9 C. C. A., 521."

In *The Egyptian Monarch* (D. C. N. J.), 36 Fed., 773 (1888), it was held that a second mate, who superintended the reeling-in of a hawser, was a fellow-servant with a seaman; common law and admiralty cases were cited as authority, no distinction being made between them.

The only cases known to us in which there is an intimation that a different rule in this respect obtains in admiralty to that at common law are the case at bar and *Cornell Steamboat Co.* v. *Fallon,* 179 Fed., 293. In the latter case the opinion was written by the same learned Judge who made the decision now under review. It is interesting to note, however, that in the *Cornell* case Judge Coxe concurred in the result, but did not concur in Judge Ward's holding that there is no fellow-servant rule in admiralty. He said that the facts warranted an affirmance of the judgment upon principles of common law, and, at page 295:

> "The question presented by the opinion of the court is an interesting and novel one, but no allusion is made to it in either brief and it was not mentioned at the argument."

Of course, that was before the passage of the Seamen's Act, and there was then no recovery for injuries sustained through the negligence of a fellow-servant in either court. As this was so, it was an academic question whether the rule was the same in both courts. But upon the passage of the act it becomes quite material.

Other jurists drew a different meaning from *The Osceola* decision, as will appear from the cases decided subsequently thereto.

In *The New York,* 204 Fed., 765, the Circuit Court of Appeals for the Second Ciircuit, in reversing a judgment for damages for injuries received by a seaman, held that as the negligence which caused the accident consisted of the failure of the libelant's superiors to warn him of the dangers of his employment, this negligence was the negligence of a fellow-servant, and hence there could be no recovery.

A similar rule was announced in *The Nyack,* 199 Fed., 383, by the Circuit Court of Appeals for the Seventh Circuit.

In *The Buffalo,* 154 Fed., 815, the Circuit Court of Appeals for the Second Circuit held that the rule laid down in *The Osceola* did not apply to a longshoreman employed by the owner of the ship and working on it. We see no reason why such exception should be made unless the fellow-servant rule be the reason for the *Osceola* decision. A longshoreman, not being a member of the crew, could not be a fellow-servant with the crew, and, therefore, their negligence would not be a bar to his recovery.

In *Bettis* v. *Leyland,* 153 Fed., 571 (Circuit Court of Appeals, Fifth Circuit), which was a libel *in personam,* the question in issue was whether or not the owner was liable for injuries sustained by a seaman by reason of the failure of the master or mate to make the surroundings safe. The Court held that as "the premises were only made dangerously unsafe by the negligent handling of the hatch furniture, which was entirely under the control of the libelant and his co-laborers," there could be no recovery.

These cases are in direct conflict with the decision of the Circuit Court of Appeals in the present case, and it seems clear according to their reasoning that if there had been a statute involved similar to the statute under consideration the Courts would in each case have proceeded to determine whether or not the fellow-servant causing the injury was a seaman in command, and if this question had been determined in the affirmative there would necessarily have been a recovery by the libelants.

In *Matter of Tonawanda Iron & Steel Co.*, 234 Fed., 198, the District Court for the Western District of New York had occasion to consider the effect of the act concerned in this action. The proceeding there was for limitation of liability, and the particular claim involved was one by a seaman for personal injuries claimed to have been caused by the improper lighting of the stern deck of the vessel. It was held that the injuries were due to the negligent acts of a fellow-servant, either the master or the mate. The Court then proceeded to a discussion of Section 20 of the Seamen's Act, and would have applied it to the case had it not been that the injuries were received prior to its passage. The Court says, page 201:

> "* * * in the case at bar the Seamen's Act made a substantive change in the maritime law of the land creating a new liability —not simply changing methods of procedure or rules of evidence or affecting the statute of limitation—and making the ship or her owner answerable for the negligence of the officers charged with the responsibility of her navigation, as a result of which a seaman sustains injuries."

After a careful review of all the cases reported involving torts occurring on shipboard, we find that, with the exception of the case at bar and the *Fallon* case above referred to (see p. 77), both the State and Federal Courts have considered the common law principles which determine liability as between master and servant on land, to be the principles which determine liability as between seaman and owner on board ship.

The cases which prove this statement follow, some of them having been more particularly referred to in the preceding pages of this brief.

SUPREME COURT:

Quebec S. S. Co. v. *Merchant*, 133 U. S., 375 (common law).

FIRST CIRCUIT:

The A. Heaton, 43 Fed., 92, Circuit Court, Mass., Justice Gray (admiralty).

SECOND CIRCUIT:

The Miami, 93 Fed., 218 (C. C. A.), admiralty.

The Esperanza, 133 Fed., 1015 (D. C. N. Y.), admiralty.

The Charles H. Klinck, 172 Fed., 1019 (D. C. N. Y.), admiralty.

The New York, 204 Fed., 765 (C. C. A.), admiralty.

Matter of Tonawanda, 234 Fed., 198 (D. C. N. Y.), admiralty.

THIRD CIRCUIT:

The Islands, 28 Fed., 878 (D. C. N. Y.), admiralty; injury to stevedore.

The Egyptian Monarch, 36 Fed., 773 (D. C. N. J.), admiralty.

The Elton, 142 Fed., 367 (C. C. A.), admiralty; injury to stevedore.

FOURTH CIRCUIT:

No cases of tort on shipboard reported.

FIFTH CIRCUIT:

Red River Line v. *Cheatham*, 60 Fed., 517, common law.

Tropical Fruit S. S. Co. v. *Towle*, 222 Fed., 867 (C. C. A.), admiralty.

SIXTH CIRCUIT:

No cases of tort on shipboard reported except *Schwede* v. *Zenith S. S. Co.* above referred to.

SEVENTH AND EIGHTH CIRCUITS:

No cases of tort on shipboard reported.

NINTH CIRCUIT:

Halverson v. *Nisen*, 3 Sawyer, 562 (D. C. Cal.), admiralty, holding no recovery to seaman for injuries caused by negligence of mate because of fellow-servant rule.

Daub v. *Northern Pacific Ry.*, 18 Fed., 625 (Cir. Ct. Oregon), admiralty.

The Clatsop Chief, 8 Fed., 163 (D. C. Oregon), admiralty.

Olsen v. *Oregon etc. Co.*, 104 Fed., 574 (C. C. A., 1900). This case has been cited in many instances as an authority for the fellow-servant rule in admiralty. It holds that in the navigation of a vessel, the officers and seamen are regarded by the common law as well as by the admiralty law as fellow-servants.

The Walla Walla, 46 Fed., 198 (C. C. Wash.), admiralty; injury to longshoreman.

The Colusa, 241 Fed., 568 (D. C. Cal.), affirmed by Circuit Court of Appeals.

STATE COURTS, ACTIONS AT COMMON LAW:

Benson v. *Goodwin*, 147 Mass., 237 (1888).

Kalleck v. *Deering*, 161 Mass., 469.

Hollis v. *Widener*, 228 Pa. St., 466.

Hogan v. *Smith*, 125 N. Y., 774 (injury to longshoreman).
Gabrielson v. *Waydell*, 135 N. Y., 1.
Geoghegan v. *Atlas S. S. Co.*, 3 Misc. (N. Y.), 224; affirmed 146 N. Y., 369.
Olsen v. *Clyde*, 32 Hun (N. Y.), 425.
Scarff v. *Metcalf*, 107 N. Y., 211.

CONCLUSION.

It is remarkable that such elementary questions as those involved in this case are supposed to be debatable at this time. Both common law and admiralty courts have applied common law principles from time immemoriol to torts arising out of the relation of seaman to ship owner. Every court in the land has considered the seamen as fellow-servants with each other. Congress so considered them, and changed their relation. The will of Congress must be respected, and it requires no straining of legal principles to say that as the bar has been removed recovery should be allowed.

If the Court feels that there is a doubt about the holding of the admiralty courts, in view of the decision in *The Osceola*, we say that whatever may be the rule in admiralty the rule at common law is clear. That rule has certainly been changed, and, with the exception of *Cornell S. B. Co.* v. *Fallon*, *supra*, no decision up to the time of the decision herein has denied it.

We respectfully submit that the decision under review should be reversed, and the cause remanded to the District Court for a new trial, at which time the questions of contributory negligence, assumption of risk, negligence of defendant, and whether or not the engineer was a seaman having command,

should be submitted to the jury under appropriate instructions from the Court.

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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 657.

PETER CHELENTIS,
Petitioner,

vs.

LUCKENBACH STEAMSHIP COMPANY, INC.,
Respondent.

BRIEF IN BEHALF OF RESPONDENT LUCKENBACH STEAMSHIP COMPANY, INC.

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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 657.

PETER CHELENTIS,
Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Respondent.

Brief on Behalf of Respondent Luckenbach Steamship Company, Inc.

This proceeding comes to this Court on a writ of certiorari from this Court to review a judgment (fols. 76, 77) of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Southern District of New York, entered herein on October 19th, 1916, on the direction of a verdict in favor of defendant (the respondent herein), Luckenbach Steamship Company, Inc. (R., p. 12).

Statement.

This action was brought by the petitioner (the plaintiff-in-error herein) in the Supreme Court,

New York County, against the respondent, by the service of a complaint (R., p. 2). Thereafter, and before filing answer, an order, by consent, was entered on the 7th day of June, 1916, transferring the said action from the Supreme Court, New York County, to the United States District Court for the Southern District of New York, on the grounds of a diversity of citizenship: petitioner being a resident of the State of New York, and the respondent a foreign corporation, organized and existing under the laws of the State of Delaware (R., pp. 5 and 6). The complaint as against Luckenbach Company, Inc. (fol. 11), was withdrawn at the trial of the action in the lower court (fol. 25).

The complaint alleges:

> "FOURTH: That on or about the 26th day of December, 1915, and at the times hereinafter mentioned, the plaintiff was in the employ of the above-named defendants on board said vessel" (fol. 5).

This petitioner was a fireman on board the steamship *J. L. Luckenbach.*

The complaint further alleges:

> "that it was the duty of the defendants to provide plaintiff with a safe place to work; with reasonably safe tools and appliances and keep same in repair; to furnish plaintiff with a suitable number of co-employees and superior officers; to promulgate and enforce proper rules for the safe conduct of the work and to warn plaintiff of the dangers arising and to be encountered therein" (Fifth Article of Complaint, fol. 14).
>
> "That by reason of the negligent and unlawful failure of the defendants and persons

in their service having command to perform the foregoing duties and each of them, and because said defendants and said persons in their service having command, negligently failed to provide plaintiff with reasonably safe tools and appliances or with life lines, barriers, guards, enclosures or other devices, and because said defendants and said persons in their service having command, negligently and unlawfully compelled plaintiff to carry an ash bag across an open and exposed deck on board said vessel during a severe storm and while the waves were calculated to and did break over the same, plaintiff, although himself in the exercise of due care, was suddenly and without warning struck by a wave with great violence and precipitated from his feet, thereby sustaining severe, painful and permanent personal injuries" (Sixth Article, fols. 5, 6).

"That said injuries were not caused by any fault or want of care on the part of the plaintiff, but wholly and solely by reason of the negligence of the defendants and persons in their service having command in causing plaintiff to do said work under dangerous conditions and failing to guard against same or to take any precautions for plaintiff's safety" (Eighth Article, fol. 7).

In the Fifth Article of its answer the respondent, Luckenbach Steamship Company, Inc., denies the allegations of the Fifth, Sixth, Seventh and Eighth Articles of the complaint (fol. 17).

The respondent sets forth in its answer, as a second and separate defense (fol. 18), the following:

"SEVENTH: That the alleged accident and injury sustained by the plaintiff were due to the negligence or fault of the plaintiff * * * and were not caused by any

> negligence or fault on the part of anyone for whose acts defendant is liable or responsible, or on account of any unseaworthiness of the said steamship; and if the defendant as lessee of the said steamship is liable for the alleged injury the plaintiff sustained through the neglect of his fellow-servants * * * or through his own neglect, then in accordance with the General Maritime Law as administered in the United States, the said defendant is only liable for the wages due the plaintiff to the end of the voyage and his maintenance and the expense of cure."

The respondent sets forth in its answer, as a third and separate defense (fol. 18), the following:

> "EIGHTH: That any injuries sustained by the plaintiff were sustained in the ordinary course of his employment and occupation; that such alleged injuries were the result of the necessary risks of his occupation and employment and which were inherent in the nature of the business in which he was employed and which were assumed by him at the time he entered it and at the time he met with the accident complained of; that the said plaintiff on the 26th day of December, 1915, and prior thereto, had full knowledge of the said risks, and that by continuing his employment with full knowledge of the existence of such necessary risks and dangers, the plaintiff assumed the risk thereof and the injuries resulting therefrom."

It is respectfully submitted that no consideration need be given by this Court to the respondent's fourth and separate defense, as the learned Trial Judge did not give any consideration thereto, as counsel for petitioner did not contend on the trial of the case that the steamship *J. L. Luckenbach* was in any way unseaworthy, although the complaint

(fols. 5, 6) contains the usual allegation of unseaworthiness, which is charged in all such cases, even where the pleader never expects to be able to prove such allegation. Furthermore, the petitioner, on page 8 of his brief, in the Circuit Court of Appeals, admits the seaworthiness of the said steamship, in the following statement:

> "In the case at bar it was apparent to the plaintiff that the tools and appliances were reasonably safe."

There is no assignment of error covering the admission or exclusion of testimony detrimental to the petitioner.

The Trial Court did, as a matter of law, decide on the facts that there was not sufficient evidence of the negligence of the respondent, Luckenbach Steamship Company, Inc., to warrant its submission to the jury.

This Court is limited in reviewing the correctness of the findings on the law, and must affirm same if there be any evidence in support thereof.

> *City of Camden* v. *Armstrong Cork Co.*, 210 Fed., 820.

If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the Court to determine it.

> *Bowden* v. *Lehigh Valley Railroad Co.*, 178 App. Div., p. 413, at pp. 420, 421.

In the case of *Dernberger* v. *Baltimore & O. R. R. Co.*, 234 Fed. (D. C., N. D. West Virginia), 403, at

p. 406, *et seq.*, and cases cited, it is Held, where the evidence is such that a verdict based thereon would be set aside, it is proper for the Trial Court, particularly in negligence actions, to direct a verdict for defendant; the Scintilla Rule not prevailing.

See:

New York, etc., R. R. v. *Vizvari,* 210 Fed. (C. C. A., 2nd Cir.), at p. 127.

Assignments of Error First, Second, Third, Fourth (fols. 62 to 63), Fifth, Sixth, Seventh (fols. 64 to 67) and Ninth, are repetitions, more or less.

The Eighth Assignment of Error (fol. 66), Subdivisions a and b, is the only one to be considered by this Court. Subdivision c is covered by Subdivision b of said assignment.

POINT I.

On the evidence the Trial Court was, as a matter of law, justified in finding that the respondent was free from negligence, dismissing the complaint and directing a verdict in favor of the respondent.

The petitioner has not by legal evidence shown any negligence on the part of the respondent, and has wholly failed to establish the allegations of the Fifth, Sixth and Eighth Articles of his complaint (fols. 5-7).

At the ~~case~~ close of the case the Court asked Mr. Graves, counsel for the petitioner, what he had to

say, referring to the question of negligence, and where was the negligence, and Mr. Graves replied:

> "The direct testimony is that the order was to dump it over the port side.
>
> The Court: Suppose he was told to jump overboard, is he compelled to do that?
>
> Mr. Graves: No; but this is an order given in the navigation of the ship.
>
> The Court: Suppose he told him to go over and strike another man. Does he have to do that?" (fol. 53).

In directing the verdict, the Court said to the jury (fol. 55):

> "I will say that I see no proof in this case of any negligence on the part of the owner of this ship. I think that the plaintiff himself assumed the risks incident to the work, and I think further that there was contributory negligence. Under the maritime law, as laid down in the case of *Osceola,* 189 U. S., page 160, the only obligation of a shipowner would be for maintenance and cure and wages, unless it be shown by some evidence that the ship was not fit for sea because of unseaworthiness. There is no evidence in this case of any unseaworthiness, nor is there any claim or evidence for wages or maintenance or cure."

In this case under review no claim is made by the petitioner for maintenance and cure (fol. 36).

The following testimony of the petitioner, briefly stated, shows conclusively that the respondent was not negligent:

> "Have been a fireman in the United States about three years; have been a fireman altogether ten or eleven years; was a fireman on the *J. L. Luckenbach* (fol. 26); I was going

to throw ashes overboard; I been before—12 o'clock to 4 o'clock, and I gone up to the deck, and there was so much wind and water, a big sea, and I stopped for about half an hour after 4 o'clock, and half-past four I gone down in the engine room, and tell Mr. Kayser, the first assistant, to give me another man, and I—Mr. Kayser he said to me, 'I can't give you another man; you go ahead * * * and throw the ashes overboard.' After I came upstairs the waves pushed me. After fifteen seconds—I no seen Kayser at all—I came and took one bucket of ashes and threw in" (fol. 27). "On the morning of December 26th, 1915, my watch was from 12 o'clock to 4. The engineer in charge of my watch was Mr. Snell, the second assistant engineer. After half an hour after 4 o'clock, I had to throw the ashes overboard, the firemen cleaned the fires, and sent the ashes up for us to throw them overboard. This was done on every ship. I did it on this ship" (fol. 28). (The plaintiff meant the watch who relieved his watch at 4 o'clock cleans the fires and sends the ashes up to be dumped overboard by the watch that has just gone off duty.)

"Mr. Kayser, the first assistant engineer, took charge of the engine room, the fire room, at 4 o'clock." "At the time I just mentioned I went downstairs on the starboard side engine room stairs. *Just before that I had been on deck. I seen the condition of the weather. The wind was blowing on the port side, the sea was pretty heavy on the port side. There were heavy waves*" (fol. 28). *"The waves were coming on to the deck."* (Italics by the respondent.) "I said to the first assistant engineer give me one other man to throw the ashes on the starboard side instead of the port side. He told me to go ahead and throw the ashes, 'the same as you used to do all the time. I will

not give you another man.'" (fol. 28). "When I say he pushed me out I mean on the starboard side of the deck. I got hold of a bag to throw it overboard. I dumped it from the port side * * * took it over about fifteen feet away" (fol. 29). "I walked across to the deck on the port side with one bag of ashes. *On the way coming back, about four feet, before I got to the port, a wave came in, the water, and took me right down, capsized me. It was a big wave*" (fols. 29-34). (Italics by the respondent.) "After the water threw me down it took me between the cross bunker and the fire room, in a small place. There is a kind of pipes there, and it put me in under the pipes. After that I was carried by the water from the port side to the starboard" (fol. 29). "The second engineer, Mr. Snell, was not on watch, he was on watch before Mr. Kayser came on" (fol. 31).

The attention of the Court is respectfully called to the answers of Mr. Graves and Mr. Carter to questions put by the Court about Mr. Kayser's position, whether he had charge of the watch and if the petitioner was in his watch and whether he had any authority over the petitioner, which show conclusively that the said Mr. Kayser had no authority over the petitioner, and that the petitioner was not in his watch (fols. 32, 33).

The petitioner further testified:

> *"On the morning that I was hurt, the way the wind was blowing, the right-hand side of the vessel was the right side to dump ashes overboard. I mean the starboard side. And also the leeside"* (fol. 33). (Italics by the respondent.)
>
> "When on watch take orders only from the officer of my watch. Before Mr. Snell

> went off watch he did not tell me anything about taking the ashes away and dump them overboard. I started dumping ashes because I have to do it, after 4 o'clock, after four hours' duty I have to dump my ashes. *I know it is my duty when I come off watch without Mr. Snell telling me to dump the ashes, that is part of my duty without being told*" (fol. 34). (Italics by the respondent.)

Thomas Nicholas, witness on behalf of the petitioner, who was in petitioner's watch and assisted him to hoist and dump ashes, testified as follows:

> "I gave Chelentis the first bag, he took it outside and the sea came over him and hit him, and threw him down with the bag" (fol. 39).

That does not agree with the testimony given by the petitioner—he testified:

> "On the way coming back to get another bag, about four feet, before I got to the port a wave came in, the water, and took me right down, capsized me," etc. (fol. 29).

Thomas Nicholas further testified:

> "The fire room door was closed on account of the pressure of the water; I pushed against it and looked out and could see nothing, and looked on the other side" (starboard side), "and saw Chelentis against the rail" (fol. 39).

The Court's attention is respectfully called to the testimony of the petitioner Chelentis to the effect that the port fire room door was opened or could be opened, and that it was out of the port side he went with the first bag of ashes.

The respondent has always contended that the port fire room door was locked and could not be opened, to prevent the water, when shipped, from going down into the fire and engine room, and the starboard fire room entrance had to be used to get the ashes out to dump them on the starboard or lee side of the steamer on that morning.

The testimony of Nicholas does not agree with that of the petitioner about Mr. Kayser, the first assistant engineer, striking and pushing the petitioner (see testimony of Nicholas, fols. 39 to 41).

The testimony of Nicholas about the petitioner being washed from the port side to the starboard side (fol. 41) is absolutely untrue, as is shown by the diagram of the ship in evidence (Defendant's Exhibit A, fol. 42). Diagram to be handed up to the Court on argument of case. If the water came over the bow (b) on the port side (c), the sea would go aft to (d), and if the petitioner was on the port side (but which respondent denies) he would be carried aft with the sea rushing aft, but he could not be carried forward to (b) the bow and around the bow to the starboard side (a), as that is a physical impossibility.

Hassan Omer, a witness for the petitioner, who was a fireman on the steamer (fol. 42), testified: he came on deck to get a drink of water about 3 o'clock in the morning (fol. 43). He went to save the petitioner, but as his (Omer's) hand was cut he could not give the petitioner much help. At the time Chelentis was on the left side of the steamer; he was on deck same place where he was throwing ashes over (fol. 43).

The respondent claims that the testimony of said Omer is not true, and, therefore, no consideration

should be given to it. If Omer did come on deck at 3 A. M. (but which respondent denies), will the Court believe that he remained on deck until 4.30 A. M.—one hour and a half—the time the petitioner was injured (Omer claims it was around 3 o'clock Chelentis was injured), particularly taking into consideration the weather conditions existing at the time, on the morning of December 26th, 1915? In such weather sailors do not remain on deck longer than they have to; they go below. Furthermore, Omer did not render any assistance to the petitioner, as the petitioner himself testified that the first person who came to his assistance when he lay on the deck was the chief engineer (fol. 35). Will the Court believe the testimony of Omer as to how the steamer was shipping seas and acting while he was on deck—heavy seas running—and that he remained on deck (when he did not have to) and allowed the water to come up to his knees? (fol. 44).

Before the Court directed a verdict in favor of the respondent, counsel for the petitioner called the Court's attention to the Merchant Seaman Act of March 4th, 1915, Section 20, which became effective November 4th, 1915 (U. S. Stat. at L., Vol. 38, p. 1164, Sec. 20, at p. 1185), which is to the effect that in any suit to recover damages for any injuries sustained on board vessel, or in its service, the man in charge should not be held to be a fellow-servant with those under his authority.

Mr. Graves, trial counsel for petitioner, contended that Mr. Kayser, first assistant engineer, who was over that part of the work, was directly in charge of the petitioner, although on the trial the petitioner showed by his testimony that Mr. Kayser had no authority over him, and Mr. Graves, counsel for petitioner, refused to concede that Kayser had

any authority over the petitioner. Yet, throughout the trial Mr. Graves tried to establish the authority of Mr. Kayser over the petitioner, even when it was proven that petitioner was not in Mr. Kayser's watch.

Eldon H. Read, master, and Albert P. Kayser, first assistant engineer, of the steamship *J. L. Luckenbach,* were called as witnesses on behalf of the petitioner.

Captain Read does not show by his testimony that Kayser had any authority over the petitioner (fols. 48, 49); and Mr. Kayser clearly shows by his testimony that he had no authority over the petitioner (fols. 49 to 53). He also testified:

> "Mr. Chelentis is not above me. *He was in Mr. Snell's watch. He was not in my watch. I had nothing to do with him, nor to give orders to him"* (fol. 49, see 50.) (Italics by respondent.)

The Court's attention was called to the Seaman's Act, Section 20, and the question was raised as to whether there was sufficient proof in the case of the authority of Mr. Kayser, and whether the said Act covered the acts of an inferior officer to bind the respondent, providing that officer was acting within the scope of his authority and had authority over the person injured. The Court then said to the jury:

> "Under the proof of this" (fol. 56) "case, I do not think that there is sufficient evidence before us which raises squarely the point of law presented by counsel for the plaintiff. However, I believe that the section is intended to make the owner of the ship responsible for the act of some person in authority on the ship, such as the captain or the mate

of the ship, and has no application to a case such as here presented, where the owner of a ship is charged with negligence, in an alleged negligent command or order given by an assistant engineer in charge for the time being of the fire room or engine room; and for this reason or for these reasons, I feel it encumbent upon me to dismiss this case" (fol. 56).

The evidence produced by the petitioner shows overwhelmingly that the respondent was not negligent; and it is respectfully submitted the learned Trial Judge was justified in directing a verdict for the respondent.

Even if it had been shown by the testimony of the petitioner that the respondent was liable for the acts of Mr. Kayser, the first assistant engineer, in ordering the petitioner to dump the ashes during the storm (which respondent denies), the respondent still would not have been liable for the petitioner's injuries beyond his maintenance and cure, within the law established by the following decisions:

Globe S. S. Co. v. *Moss,* 245 Fed., 54, at p. 60.

The Bouker No. 2, 241 Fed., 831.

The Osceola, 189 U. S., p. 158.

The Bunker Hill, 198 Fed., 587, at pp. 588, 591.

Cornell Steamboat Co. v. *Fallon,* 179 Fed., 293, at pp. 294, 295.

The P. P. Miller, 180 Fed. (D. C., W. D. of N. Y.), 288, at p. 290.

The Nyack, 199 Fed., 383, at pp. 389, 390.

Wilson v. *Manhattan Canning Co.,* 205 Fed., 996.

As no claim is made in this case under review for maintenance and cure, and as the petitioner stands upon his common law rights, he cannot recover any damages from the respondent where his injuries are caused by his fault.

Had Mr. Kayser, the first assistant engineer, assaulted the petitioner when the petitioner said he wanted another man to assist him to dump the ashes and did not want to dump the ashes without assistance, neither the respondent nor the steamship would have been liable for such assault or the injuries the petitioner thereby sustained, if the master or the respondent, the owner, produced the officer making the assault, as required by Section 9 of the Merchant Seamen's Act passed March 4, 1915 (U. S. Stat. at L., Vol. 38, p. 1167); and which Act has been construed in the case of

The Blakeley, 234 Fed., 959, at p. 960.

There is no merit in the statement made by the petitioner that if he had refused to dump the ashes Mr. Kayser was liable to put him in irons, and that Mr. Kayser used profane language (fol. 34).

Had the petitioner been put in irons by Mr. Kayser, or by Mr. Snell, in whose watch the petitioner was, for refusing to dump the ashes after he had voluntarily undertaken to do so and which, he has testified, it was his duty to do when off watch (fol. 34), that officer, as well as the respondent, would have been released from any claim for damages under the Merchant Seamen's Act, Section 7, Subdivisions 4 and 5 (U. S. Stat. at L., Vol. 38, p. 1164, Sec. 7, at pp. 1166, 1167).

The decisions cited under Point I of the brief of the petitioner, on the question of negligence and the refusal of the Court to submit the question to

the jury, are not in conflict with the decisions cited by the respondent under this point, on the petitioner's proof.

The cases of the *Chicago etc. Ry. Co.* v. *Nelson,* and *Gardner* v. *Michigan Central Rd.,* in petitioner's brief, clearly show that, as a question of law, on the proofs adduced by the petitioner, the Trial Judge was justified in directing a verdict in favor of the respondent, as the only conclusion that could be drawn from the evidence was that the respondent was not in any way negligent.

It is further contended by the respondent, decisions holding that where personal injuries happen on the land, the question of the negligence of the respondent or the master should be submitted to the jury, cannot be held applicable to cases where the seaman sustains his injuries on board of a vessel—as in this case under review, as shown by the facts presented.

The comments made in petitioner's brief, on the question of the authority of Mr. Kayser over the petitioner, and the applicability of Section 20 of the Seaman's Act, have been fully challenged and disposed of under this point of respondent's brief.

It is maintained by the respondent, and respectfully submitted, that the petitioner did not sustain his injuries by being knocked down by a sea which boarded the steamer just at that part of the steamer where he was at the time; but he received his injuries when kicking out the wash gate on the starboard side to permit him to dump the ashes overboard, and when the steamer listed or rolled over to port the wash gate shut and caught his right leg (and for that reason the questions at fols. 35 to 36 were asked of the petitioner), if not, then his injuries were caused by the act of God and a peril of

the seas—storm and seas—for which the respondent cannot be held liable.

On the evidence produced, the material part of which has been called to the attention of the Court, and on the cases cited showing clearly there is no liability on the part of the respondent herein, it is respectfully submitted that the judgment entered on the verdict directed by the Court in favor of the respondent and affirmed by the Circuit of Appeals should be affirmed.

POINT II.

As a matter of law the Trial Court was justified in finding, on the evidence, that the petitioner was guilty of contributory negligence and in dismissing the complaint and directing a verdict in favor of the respondent.

The petitioner relies on Section 20 of the Merchant Seamen's Act of March 4, 1915 (at p. 1185, 38 Stat. at L.), which reads:

> "That in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority,"

to sustain his case, holding that that section applies to subordinate officers, as well as the master and chief engineer, of vessels, for negligence in the performance of their duties, and relieves the seaman (the petitioner) from his acts of contributory negligence.

The counsel for respondent does not agree with the construction which counsel for petitioner places on said section. Counsel for respondent maintains said Section 20 was passed to put at rest all uncertainty as to whether the master of the vessel or those as high in command as the master—the chief engineer—was a fellow-servant with the seamen under him, as that question of law was left open in the case of *The Osccola,* 189 U. S., p. 158, and the case of *The Hamilton,* 207 U. S., p. 406 (see the opinion of the Circuit Court of Appeals in affirming the judgment, fols. 71-74).

To avoid repetition, the Court is respectfully referred to the testimony of the petitioner set forth under Point I hereof, showing how the petitioner received his injuries, his experience as a fireman, his knowledge of the conditions existing on that morning, the duties he was to perform, and which he did not have to perform if he thought those duties were unsafe.

When the petitioner came out on deck and dumped the first bag of ashes over the starboard (not over the port side as he claims), and then went back to get the other bag of ashes, he saw the conditions which existed—the rolling of the ship and the seas boarding her—and the risk he took of being thrown down by the water boarding the ship was plainly observable, as admitted by the petitioner, and he assumed that risk in the nature of his employment; and under the following decisions the respondent is not liable for any injuries the petitioner sustained:

In the case of *The Samuel S. Thorpe,* 99 Fed. (D. C., E. D. Penn.), p. 108, the Court held:

> "Where a seaman, in performing a duty, assumes a dangerous position through his

> own negligence, directly leading to his injury, he cannot recover."

In the case of *The George Hill*, 214 Fed. (C. C. A., 2nd Cir.), at p. 81, where a deckhand had his hand caught between the bridle of a hawser he had passed to a tow and one of the bitts of the tug, the Court held:

> "insufficient to show any defect in the condition or construction of the bitt which rendered the tug liable, but rather to show that the injury was due solely to libellant's carelessness."

In the case of *The Bouker No. 2*, 241 Fed., 831, p. 833 (application for writ of certiorari denied 1917) (Opinion by HOUGH, *J.*). the Court says:

> "We may state our opinion that a seaman 'falls sick or is wounded in the service of the ship' if such misfortune attacks him while he is attached to the ship as part of her crew. It is not necessary that the wound or illness should be directly caused by some proven act of labor, it is enough that he was when incapacitated subject to the call of duty as a seaman, and earning wages as such,"

and then makes the following footnote in its opinion, at p. 833:

> "This statement is made without overlooking the exception, that sickness or injury occasioned by the seaman's wilful wrongdoing, gives him no rights against vessel or owners."

As the injuries Chelentis, the petitioner, sustained were caused through his own wilful neglect or wrongdoing, under this latest decision, as well as the other decisions herein cited, he has no rights

against the respondent or the said steamship *J. L. Luckenbach.*

The cases above cited are admiralty cases, and in the admiralty contributory negligence of a seaman does not bar his right to recover; but this case under review is a common law action, and in the common law contributory negligence, however slight, bars the right to recover.

In the case of *New York Harbor Towboat Co.* v. *New York, Lake Erie & Western Railroad Co.,* 148 New York, 574, at p. 581, it was held, in an action at common law for a maritime tort, the admiralty rule of an equal division of damages where both vessels are at fault does not prevail, but the general rule is that neither can recover for injuries so caused—citing the case of *Belden* v. *Chase,* 150 U. S., 674, 37 L. Ed., 1218.

In the case of *George J. Francey, Respondent,* v. *The Rutland Railroad Company, Appellant* (decided February 12, 1918, and reported in the *New York Law Journal* of February 26, 1918, front page), the New York Court of Appeals held that:

> "The rule of *res ipsa loquitur* has no application in a case where the evidence leaves it a question whether the accident was due to the negligence of the defendant or to that of the plaintiff."

The facts in the case show that:

> Plaintiff, a locomotive engineer, was injured by steam escaping from a boiler flue which was forced out of its place, and on the trial of an action for the injury the proof at the conclusion of the evidence was such that the jury might have found the explosion was due to the negligence of the defendant in fail-

> ing to keep the engine in repair or to that of the plaintiff in letting cold water into the boiler. The Court charged the burden was on the defendant to establish that the accident was due to something the plaintiff himself did, and to explain the cause of the explosion. This was *held error* as the rule of *res ipsa loquitur* did not apply to shift the burden of proof."

The respondent does not controvert the contention of the petitioner, as set forth under Point I of his brief, that:

> "Liability for petitioner's injuries should be governed by the common law rather than by the admiralty law,"

for the reason that the petitioner, with the acquiescence of the Trial Judge, tried the case upon the principles of the common law.

The respondent does, however, contend that the petitioner has no claim whatever, either at common law or in the admiralty—and he cannot sustain any claim against the respondent or the owners of the steamship *J. L. Luckenbach,* as petitioner's wages were paid in full and his maintenance and cure were paid up to the time he left the hospital.

And the respondent does not controvert the principles of the common law as laid down in the cases cited under Point I of petitioner's brief, in reference to the reservations in the United States Revised Statutes saving to the suitor the common law remedy where the common law is competent to give it.

There is nothing in the United States Laws by which a seaman is prohibited from going into the common law for any claim whatever which he may

have—even wages; and the common law Court is competent to administer the law in such cases and to adopt the common law remedy applicable to the cases brought before it, on the facts; but the majority of the cases cited under Point I of petitioner's brief concern injuries upon the land between masters and servants, and under the Federal Employers Liability Act; and the law expounded in those cases, on the facts, does not control or apply to the facts in this case under review.

The case of *Eldridge* v. *Atlas Steamship Co.*, 134 N. Y., 87, cited under Point I of petitioner's brief, is not applicable to this case on the evidence produced herein, and is not controlling on the Court. That case was decided in 1892, eleven years before the decision in the case of *The Osceola* (189 U. S.) on March 2nd, 1903. That case was not followed by this Supreme Court, and the dissenting opinion written therein by HAIGHT, *J.*—and concurred in by Judges FOLLETT and PARKER—is in accordance with the admiralty decisions, and particularly the case of *The Luckenbach,* 53 Fed., 662, at p. 663 (Opinion by BROWN, *J.*), citing the case of *The Maharajah,* 40 Fed., 784; affirmed in 1 C. C. A., 181 (in which case the cogwheels of a winch on a vessel were not covered); also citing *Railroad Co.* v. *McDade,* 135 U. S., 554, and *The Serapis,* 51 Fed., p. 91.

It is respectfully submitted that the petitioner was guilty of contributory negligence, and so found by the learned Trial Judge. He is not, therefore, entitled to recover for his injuries, and the judgment should be affirmed.

POINT III.

As a matter of law the Trial Court was justified in finding, on the evidence and the law, that the petitioner assumed the necessary risks of his occupation and employment which were inherent in the nature of his business as a fireman, and in dismissing the complaint and directing a verdict in favor of the respondent.

The evidence set forth under Point I and the comments made under Point II are made a part of this point, the same as if fully set forth herein.

In the case of *The Themistocles,* 235 Fed. (C. C. A., 2nd Cir.), 81, at p. 85, the Court says:

> "It is fundamental that a servant, on accepting an employment, assumes all the ordinary and usual risks and perils incident to the employment, as well as all risks which he knows or in the exercise of reasonable care may know exist."

The doctrine of assumption of risk is not confined to risks existing at the time the contract of employment is entered into, but applies to dangers which subsequently arise and which became known to the employee or which were so plainly observable that he must be presumed to have known them. *S. A. L. Ry.* v. *Horton,* 233 U. S., 492; *Chicago & E. R. R. Co.* v. *Ponn,* 191 Fed. Rep., 682.

This elementary principle of the law should have even greater force when applied to a seaman, as he has full knowledge of the accidents he is likely to meet with, while performing his duties, on board of a vessel, whether at sea or in port. The owner of

the vessel cannot control storms or the elements of the seas.

The case of *Boldt* v. *Pennsylvania Railroad Company*, 245 U. S., p. 441, an action for personal injuries claimed to have been sustained by a brakeman, was brought under the Federal Employers Liability Act; and the question arose as to whether or not the plaintiff-in-error assumed the risks incident to his employment and the risk due to negligence of employers and fellow-employees when obvious and fully known and appreciated by him. In its opinion, in the case of Boldt, this Court (at p. 445) says:

> "In *Seaboard Air Line Ry.* v. *Horton*, 233 U. S., 492, 503, we said:
>
> 'It seems to us that §4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action.' *Jacobs* v. *Southern Ry. Co.*, 241 U. S., 229, 235.
>
> At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him."

And this Court then cites cases to sustain its opinion. We also refer to the remarks of this Court, in its opinion, in the *Boldt* case, on page 446.

Under Point I of petitioner's brief (p. 46) the following admission is made:

> "Under the common law a workman by entering into the employ of another assumes all risks which are reasonably to be encountered in the conduct of the business."

Under Point II of petitioner's brief (p. 7), in the Circuit Court of Appeals, the following admission was made:

> "It is, of course, true that a seaman, like any other employee, assumes the ordinary, open and obvious risks of his trade."

On those admissions, under the decisions cited under this point, the petitioner cannot recover, and particularly as there has been no evidence produced to show that there was any latent or unknown dangers.

In conclusion, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed, with costs.

All of which is respectfully submitted.

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PETER S. CARTER,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 657.

PETER CHELENTIS,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

RESPONDENT'S REPLY BRIEF.

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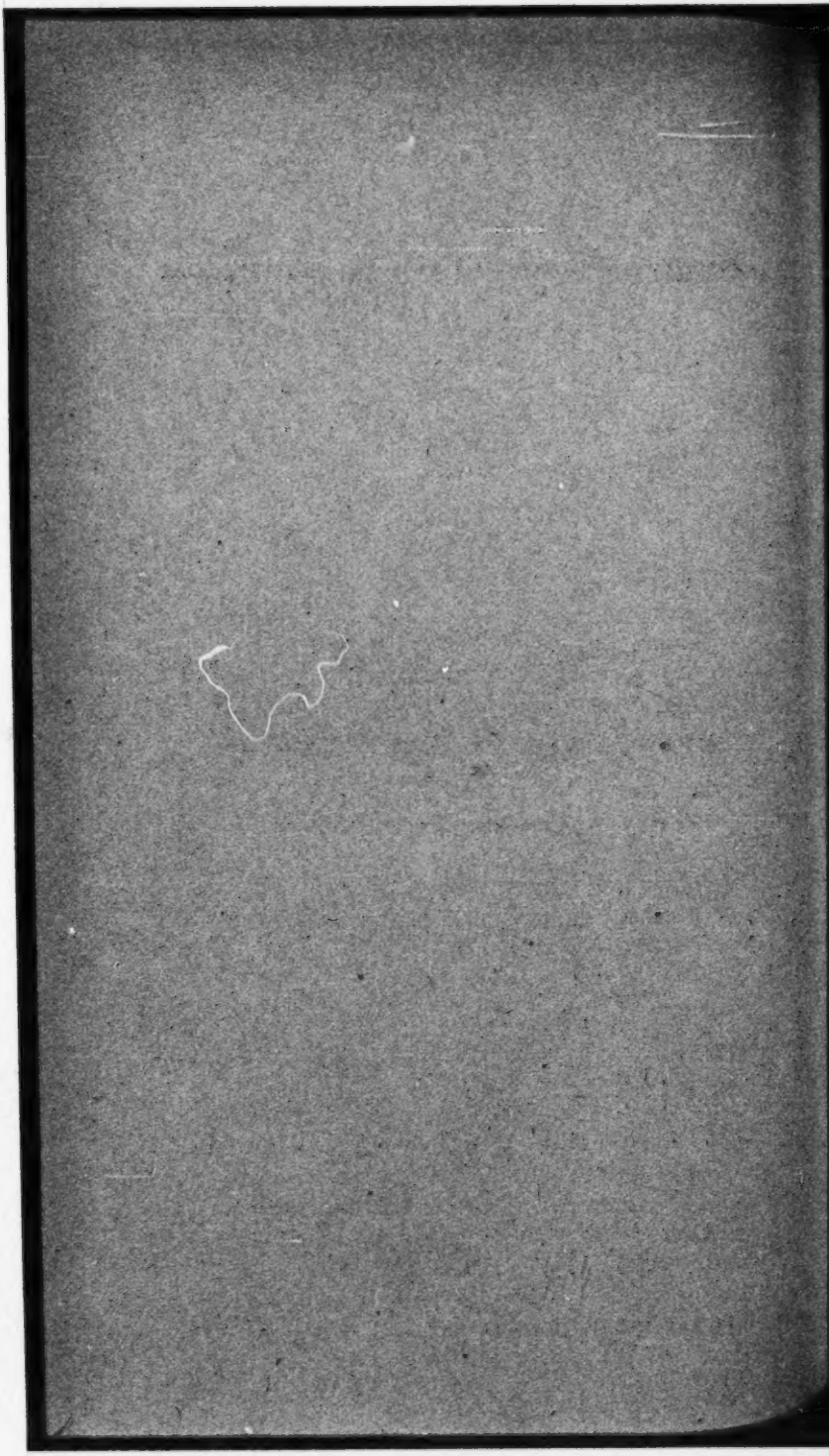

Supreme Court of the United States

OCTOBER TERM, 1917.

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PETER CHELENTIS,
Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Defendant.

RESPONDENT'S REPLY BRIEF.

The Court's attention is respectfully called to Petitioner's Brief, at page 54, where he says:

> "In *The Colusa*, 241 Fed., 568, the District Court for the Northern District of California held that a boatswain is a 'seaman having command.' This case has been affirmed by the Circuit Court of Appeals for the Ninth Circuit."

After reading that statement the Court would naturally conclude that was the only question involved in *The Colusa* case.

At the time the "Brief in behalf of the Respondent, Luckenbach Steamship Company, Inc.," was filed herein we were not in possession of the pamphlet (248 Fed., 21) in which the decision of the United States Circuit Court of Appeals for the Ninth Circuit in *The Colusa* case is reported. We have since received that pamphlet, and we note in its decision the Circuit Court of Appeals (248 Fed.,

21, at p. 24) shows that the record contains testimony to the effect that the ship was unseaworthy in that it furnished a defective turnbuckle, and that it was not simply putting in the nail by order of the boatswain to tighten up the turnbuckle that caused the injury to the seaman, and sets forth as its reason for affirming the decree of the District Court that the vessel was unseaworthy; and after referring (at p. 24) to the case of *The Osceola*, 189 U. S., 158, under Proposition "2," says:

> "But for the purposes of the present case we need only to refer to the rule which in the *Osceola* case was declared to be settled law:
>
> 'That the vessel and her owner are, both by English and American law, liable to an indemnity for injury received by seamen in consequence of the unseaworthiness of the ship, or the failure to supply and keep in order the proper appliances appurtenant to the ship.' "

If the facts in the *Colusa* case had been the same as the facts in this case under review, the Court would have held that there was no liability on the part of the steamship or her owners beyond maintenance and cure.

It is respectfully submitted that the case of *The Colusa* has no bearing whatsoever upon this case under review.

All of which is respectfully submitted,

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PETER S. CARTER,
Of Counsel.

Dated, May 10th, 1918.